



**Kamau v Nairobi City County (Employment and Labour Relations Appeal E089 of 2023) [2025] KEELRC 1723 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1723 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E089 OF 2023**

**JW KELI, J  
JUNE 12, 2025**

**BETWEEN**

**MARY WANJIRU KAMAU ..... APPELLANT**

**AND**

**NAIROBI CITY COUNTY ..... RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the Honourable R.L. Musiega (SRM) delivered at Nairobi on the 5th of May, 2023 in MCELRC No. 1693 of 2019)*

**JUDGMENT**

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable R.L. Musiega (SRM) delivered at Nairobi on the 5th of May, 2023 in MCELRC No. 1693 of 2019 between the parties filed memorandum of appeal dated the 5<sup>th</sup> day of June, 2023 seeking the following orders:-
  - a. This appeal be allowed.
  - b. The judgment and decree of 5<sup>th</sup> May 2023 be set aside and the Appellant’s claim as prayed in the Chief Magistrates memorandum of claim be allowed with costs.
  - c. The court be pleased to make any other or further orders as may be deemed fit and just in the circumstances.
  - d. The Respondent does pay the costs of this appeal.

**Grounds of the Appeal**

2. The Honourable Magistrate erred in law and in fact by dismissing the claimant’s claim in its entirety when the suit was not defended.



3. The Honourable Magistrate erred in applying against the claimant the law of extension under Regulation 70 of the PSC Regulations of 2020.’
4. The Honourable Magistrate erred by applying the law of the PSC extension under [Regulation 70 of 2020](#) retrospectively.
5. The Honourable Magistrate erred in law and in fact by failing to consider the evidence produced by the Appellant.
6. The Honourable Magistrate erred by failing to give due consideration to the Appellant’s submissions.
7. The Honourable Magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision.
8. The Honourable Magistrate failed to appreciate that the claim before him raised distinct issues and thus the claim was not determined on law and fact on merit.
9. In all the circumstances of the case, the findings of the Honourable Magistrate are unsupportable in law on the basis of the evidence adduced and the circumstances of the case.
10. The Honourable Magistrate misunderstood and misapplied the law.
11. The Honourable Magistrate erred in law and in fact in failing to consider the Appellant’s evidence when arriving at his judgment.
12. The Honourable Magistrate erred in law and in fact in disregarding vital legal and factual issues when making his ruling.
13. The Honourable Magistrate erred in law and in fact in failing to consider and apply the law appropriately.

### **Background to the Appeal**

14. The Appellant filed a claim against the Respondent vide a memorandum of claim dated 13<sup>th</sup> September 2019 seeking the following orders:-
  - i. General damages
  - ii. A declaration be made that the Claimant’s right not to be discriminated against under Article 27 (4), (5), (6) and (7) of the [Constitution](#) of Kenya and Article 7 of the Universal Declaration of Human Rights was violated.
  - iii. A declaration be made that the failure by the Respondent to extend the Claimant’s retirement age from 60 years to 65 years in total disregard of the stated government policy amounted to a violation of her right not to be discriminated against on the grounds of health, age and disability.
  - iv. A declaration be made that failure by the Respondent in recognizing the Claimant as a disabled person pursuant to the [Persons with Disabilities Act](#) No. 14 of 2003 is a discrimination against the Claimant and a violation of her constitutional rights.
  - v. A declaration that the act of sending her on early retirement by the Respondent on the basis that she is not disabled amounts to an act of discrimination against the Claimant and that it offends Article 27 (4) of the [Constitution](#).



- vi. A declaration that the Claimant's right to be treated with dignity as provided for under Article 28 and 54 (1) of the Constitution has been and remains violated and threatened by the Respondent.
  - vii. A declaration that the Respondent has violated and continues to violate Section 15 of the Persons with Disabilities Act as well as Article 1 of the Convention on the Rights of Persons with Disabilities.
  - viii. The full salary with effect from 1<sup>st</sup> January 2017 to the date of the judgment at Kenya Shillings Twenty Eight Thousand Nine Hundred and Forty (Kshs. 28,940.00) per month.
  - ix. An order reinstating the Claimant to the position she was in before her retirement.  
  
In the alternative, an order do issue compelling the Respondent to pay the Claimant a sum equivalent to the unexhausted statutory working years until the age of 65 as a guarantee under Section 15 of the Persons with Disabilities Act at Kenya Shillings Twenty Eight Thousand Nine Hundred and Forty (Kshs. 28,940.00) per month.
  - x. Compensation; and
  - xi. Any other order and/or direction that this court may deem fit to grant.
15. The Appellant filed her verifying affidavit, list of witnesses, witness statement and list of documents all dated the 13<sup>th</sup> of September 2019 (see pages 9-36 of ROA), an additional list of witnesses (page 44 of ROA) and the witness statement of Joseph Karanja Kamau (pages 45-47 of ROA).
  16. The claim was opposed by the Respondent who entered appearance and filed a Statement of Defence (pages 39-43 of ROA). The Respondent did not file any other documents at the trial court.
  17. The Claimant/Appellant's case was heard ex-parte on the 16<sup>th</sup> of June 2022. The claimant relied on her witness statement, and produced her documents (pages 58-59 of ROA).
  18. The Trial Court issued directions on filing of written submissions after the hearing. The Claimant complied.
  19. The Trial Magistrate Court delivered its judgment on the 5<sup>th</sup> of May 2023 dismissing the Claimant/Appellant's case with no order as to costs (Judgment at pages 62-66 of ROA).

### **Determination**

20. The appeal was canvassed by way of written submissions. Both parties filed.
21. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-  
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."



22. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

### **Issues for determination**

23. The appellant’s issues for determination were:-
- a. whether the Appellant is a Person Living with Disability?
  - b. Whether the learned Magistrate erred by applying the law of the PSC extension under Regulation 70 of 2020 retrospectively.
  - c. Whether the Appellant’s Appeal is merited
24. The Respondent’s issues for determination were:-
- a. Whether the appellant’s retirement was lawful and fair
  - b. Whether the appellant is entitled to the orders sought.
25. The court taking into account the grounds of appeal and the issues addressed by the parties was of the considered opinion that the issues placed before the court for determination at first appeal were as follows:-
- a. Whether the Appellant was qualified as a Person Living with Disability as at time of retirement?
  - b. Whether the learned Magistrate erred by applying Regulation 70 of the Public Service Commission Regulations of 2020 retrospectively to dismiss the case.
  - c. Whether the Appellant’s Appeal is merited

### **Whether the Appellant was qualified as a Person Living with disability as at time of retirement**

#### **Appellant’s submissions**

26. The Appellant contended she had been living with polio (poliomyelitis) and mental disability before her employment as a cleaner and that throughout her employment she had been in this condition. That the Respondent by its letter dated 18th October, 2011 invited the Appellant to appear before the medical board. That when the Appellant appeared before the medical board she was required to provide to her employer with medical report among others documents as a proof of her disability. That the Appellant due to her condition and disability she has to rely on her brother’s assistance to get this document and also go for medical assessment to enjoy the privileges. That as a result of the Appellant’s condition she had to be accompanied by her brother so she can book medical assessment and also attend the medical tests. This came at the time the country was facing hard times due to doctors’ strikes and patients were going unattended in the hospitals.
27. The appellant submitted that she was able to get her medical report which confirmed her disability and a recommendation was given for her to be registered as a Person Living with Disability. That as a consequence of the foregoing violations, the Appellant has suffered loss and damage for which she



holds the Respondent responsible. The Respondent's action is in breach of the legitimate expectation of the Appellant to serve until retirement age accorded to person with disabilities as per the laws of Kenya. The appellant to buttress the foregoing submissions relied on the case of *Margaret Martha Byama v Alice A. Otwala & 3 others* [2016] eKLR where the court held that:- 'Under the Act disability is defined as "a physical sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity which impacts adversely on social economic or environmental participation. Once a person has been certified to be one with disability as provided in the Act that person qualifies to be registered in accordance with section 7(1) (c) of the Act. The Act does not make any provision on when a person must register once certified to be a person with disability. What the Court can deduce from this deliberate omission in the Act is that disability can either be congenital or as a result of subsequent illness or incidental injury. The latter aspect can occur to anyone at any stage in life. Therefore Parliament in its wisdom saw the mischief or injustice which would occur if timelines were set on when to register as a person with disability. The respondent has raised issue with the timing of the registration of the petitioner as a person with disability contending it was an afterthought intended to extend her retirement age. The respondents however have not disputed the fact that the petitioner was certified by a medical team to be a person with disability and consequently registered as such. They have further not subjected the petitioner to a second opinion to verify the findings by the Kiambu Medical team. Disability is physical sensory, mental or other impairment which adversely affects the person concerned in his or her social, economic or environmental participation. It exists as a fact whether registered or not. Registration is simply to create a database for purposes of operationalizing the rights conferred by the Persons with Disability Act and the *Constitution*. It does not confer those rights which automatically exists once a person fits into the definition of disability contained in the Act. The fact that the petitioner sought to be registered around the time she was due for retirement ought not to be read much into since it was within her right to plead her disability to continue in service as per government policy for such persons. As stated earlier if the respondent were doubtful about the petitioners disability nothing prevented them from seeking a second opinion on the finding of the Kiambu Medial team. Article 20 (b) of the *Constitution* enjoins me as a Judge to interpret a right conferred or recognized by the *Constitution* in manner that most favours the enforcement of that right or fundamental freedom.'

### **Respondent's submissions**

28. The Appellant's disability is in contention. While the Appellant maintains that her disability was a fact always within the Respondent's knowledge, the Respondent denied any such knowledge. The Respondent further contends that it invited the Appellant to appear before the medical board on 27th October, 2018, vide a letter dated 18th October, 2011) at page 23 of the Record of Appeal). The Appellant did not show up. Previously, several calls had been made for her to show up before the medical board but she never heeded to them, as per the letter at page 23 (of ROA). Article 260 of the *Constitution* of Kenya, 2010 defines disability as: "any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long term effect on an individual's ability to carry out ordinary day-to-day activities." Section 2 of the *Persons with Disabilities Act* on which the Claimant's claim is premised defines disability as: "a physical, sensory, mental or other impairment including any visual, hearing, learning or physical incapability, which impacts adversely on social economic or environmental participation." A person becomes certified as a person with disability for purposes of accessing the rights and privileges under the Act by registering with the National Council for Persons with Disabilities as provided under Section 7(1)(c) of the *Persons with Disabilities Act*, which provides for registration of persons with disabilities by the National Council for Persons with Disabilities. The Court in *Stephen Kariuki Kamau & 5 others v Kenya Ports Authority & 6 others* [2016] eKLR



where the Court stated as follows:-"For purposes of determining whether any person is suffering from disability as defined in the *Constitution* and the *Persons with Disabilities Act*, section 7(1) (c) of the Act provides for registration of persons with disabilities..... to determine whether any employee.....is subject to disability as so defined." Similarly, in *Suleman Angolo & another v Executive Officer Teachers Service Commission* [2015] eKLR the Court rendered itself as follows: "Persons with Disabilities enjoy certain rights and benefits as provided in the *Persons with Disabilities Act*. These include tax exemption as provided in the Persons with Disabilities (Income Tax Deductions and Exemptions) Order. To enjoy such benefits however one must be registered with the Council-The National Council for Persons with Disabilities. The same would apply in the area of retirement."

29. The respondent urged the Court to take note of the following timelines;
- i) 18th October, 2011 - the Appellant was invited to appear before the medical board to substantiate her poliomyelitis and mental disorder allegations but she did not appear
  - ii) 8th September, 2015 the Appellant was issued with a mandatory retirement notice which was to take effect on 31st December, 2016, a 12 months' notice but she did not register as a person with disabilities within the 12 months that the notice was subsisting.
  - iii) 27th March, 2017 - the Appellant was finally registered as a person with disabilities.
30. The respondent submitted that at the time the Appellant retired on 31st December 2016, she was not registered by the National Council for Persons with Disabilities. She was only registered as a person with disabilities on 27th March, 2017, after her retirement. Therefore, the Appellant's request to retire at the age of 65 years since she is a person with disabilities is an afterthought as she registered as a person with disabilities after her retirement. The effect is that at the time of her retirement, the Appellant was not a person living with disabilities and her employer should not be faulted for retiring her at 60 years.

## Decision

31. The court on first appeal has to re-evaluate the evidence before the trial court to make own conclusion bearing in mind it has no benefit of hearing or seeing the witness( *Selle v Associated Motor Boat Co.* [1968] EA 123 ) Was the appellant qualified as a person with disability as at time of retirement ? This is a critical question. "disability" means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation"(Section 2 of the *Persons with Disabilities Act* ).
32. The claimant pleaded she had a polio condition and mental issue before joining employment with the respondent. The appellant was assessed by the doctor on 27<sup>th</sup> March 2017 , after retirement, and the medical report indicated that the appellant had no proper history of a person with mental disability. (pages 25-26 of ROA). The court then holds there was no evidence of the appellant having been assessed as a person living with mental disability during employment. Mental condition is not physical and it cannot be expected the employer can have knowledge of such disability without a medical report. The appellant who had a claim to rights enjoyed by persons living with disability had the burden to get herself medically assessed and the provide report to the employer during the tenure of her service. The appellant admitted in her pleadings that she did not provide the medical document asked by the respondent before retirement date. She pleaded that vide letter dated 18<sup>th</sup> October 2011 she was asked by the respondent to appear before the medical board. That on appearance at the board she was required to provide the employer with a medical report. The brother Joseph Karanja Kamau swore a witness statement and stated the appellant faced difficult in getting the medical report of her condition and only got it on 24<sup>th</sup> march 2017 confirming the disability and recommending she be registered as a person living with disability and the card was subsequently issued. The National



Council for Persons Living with Disability confirmed the appellant's registration as a person living with disability vide letter dated 12<sup>th</sup> April 2017 thus qualified for extension of retirement age from 60 to 65 years in terms of Government circular on retirement of public servants with disabilities (page 45-46 of ROA). The respondent in submissions stated that the appellant during her employment never provided any evidence of disability, that she was registered as a person living with disability after retirement. That the letter of 12<sup>th</sup> April 2017 was written after retirement (page 39-40 of ROA). The appellant was issued with 12 months' notice of mandatory retirement at 60 years dated September 2015. (page 24 of ROA). It was indicated that the retirement date was on 31<sup>st</sup> December 2016. The appellant produced the medical assessment dated 24<sup>th</sup> March 2017. The court noted that the doctor stated that the appellant had no proper history of a person with mental disability. The disability was indicated as mental (page 25-26 of ROA). Vide letter dated 12<sup>th</sup> April 2017 the Council wrote to the respondent stating the appellant was qualified for extension of retirement age from 60 to 65 years.

33. The appellant's case was that she was discriminated for non-extension of retirement age. In *Suleman Angolo & another v Executive Officer Teachers Service Commission* [2015] eKLR the Court rendered itself as follows:- "Persons with Disabilities enjoy certain rights and benefits as provided in the *Persons with Disabilities Act*. These include tax exemption as provided in the Persons with Disabilities (Income Tax Deductions and Exemptions) Order. To enjoy such benefits however one must be registered with the Council-The National Council for Persons with Disabilities. The same would apply in the area of retirement." The fact is the appellant was assessed and recommended as a person living with disability post retirement. There was no employer employee relationship as at the time of assessment and the recommendation for registration as a person living with disability. The doctor stated that the appellant had no proper history of a person with mental disability. The court noted the decision in *Margaret Martha Byama v Alice A Otwala & 3 others* 2016 e KLR was distinguished as the said employee was certified as a person living with disability before the retirement date. There is no employer employee relationship post retirement and thus no claim can arise against the employer of discrimination based on the said registration of the employee as a person living with disability months later. The court found the case was dead on arrival as the appellant was not qualified as a person living with a disability as the time of retirement.

**Whether the learned Magistrate erred by applying Regulation 70 of the Public Service Commission Regulations of 2020 retrospectively to dismiss the case.**

**Appellant's submissions**

34. It is a cardinal rule of statutory construction that a retrospective operation should not be given to a statute so as to impair an existing right or obligation, except with regard to procedure. In Francis Bennion's *Statutory Interpretation*, 2nd Edition, (Butter works, 1984) the position was put thus; "The essential idea of legal system is that current law should govern current activities... If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law... The true principle is that *lex prospicit non respicit* (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing law.'" According to Maxwell on the *Interpretation of Statutes*, 12th Edition (Sweet & Maxwell 1969). The Authors put the law thus:- "Perhaps no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to



the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." The Supreme Court of India deciding in the case of Mithilesh Kumari and another, vs. Prem Behari Khare, AIR 1989 SC 1247, stated; "A retrospective operation is not to be given to a statute so as to impair existing right or obligation, otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. Before applying a statute retrospectively, the Court has to be satisfied that the statute is in fact retrospective. The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of past transaction, or impair contracts, or impose new duty or attach new disability in respect of past transactions or considerations already passed, However, a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing. The general scope and purview of the statute and the remedy sought to be applied must be looked into and what was the former state of law and what the legislation contemplated has to be considered. Every law that impairs or takes away rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive. But laws made justly and for the benefit of individuals and the community as a whole may relate to a time antecedent to their commencement. The presumption against retrospectivity may in such cases be rebutted by necessary implications from the language employed in the statute. It cannot be said to be an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed. The question is whether on a proper construction the legislature may be said to have so expressed its intention". (Emphasis) The Supreme Court restated the same position in the case of Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR where the Court observed that, "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature." In the case of Pauline Anna Benadette Onyango v Kenya School of Law [2017] KEHC 9139 (KLR) the court stated that: "It emerges clearly from the above pronouncements, therefore, that Statutes dealing with or affecting substantive rights are, prima facie, prospective in their application unless otherwise expressly stated or can by necessary implications appear to have been intended to have a retrospective operation."

35. The appellant submitted that [Regulation 70 of 2020](#) provides that the mandatory retirement in the public service is 60 years or 65 years for persons with disabilities. Paragraph (2) of Regulation 70 provides that: "A public officer shall be considered for retirement as a person with disability if the officer - a) has a disability of 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 resources 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 may 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." That the Regulation was Gazetted on 28.1.2020 while the Appellant had filed her Claim in 2019, thus the Regulation does not apply to the case herein because the 2020 regulations were not intended to apply retrospectively. That the Honourable Court when applying the Regulations, had used the law retrospectively. In the case of Joseph Kipng'eno Belyon v Kenya Pipeline Company Limited (Cause 377 of 2021) [2021] KEELRC 609 (KLR) (Employment and Labour) (29 October



2021) where the court observed:- ‘The respondent submitted that the claimant is not entitled to retire at the age of 65 years because he did not meet the requirements for extension under Regulation 70 of the PSC Regulations of 2020. The said regulation provides that the mandatory retirement in the public service is 60 years or 65 years for persons with disabilities. Paragraph (2) of Regulation 70 provides that:”A public officer shall be considered for retirement as a person with disability if the officer -

- a) has a disability of 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 resources 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 may 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.”

The above regulation was Gazetted on 28.1.2020 while the extension of the claimant’s retirement age was done by the letter dated 13.3.2019. The respondent did not show that the claimant did not meet the requirements for extension in the previous regulations. Consequently, I find and hold that the above regulation does not apply to the case herein because the 2020 regulations were not intended to apply retrospectively.”

36. The respondent did not submit on the issue.

### **Decision**

37. On whether the 2020 Public Service Commission regulations could operate retrospectively, the court found the trial court relied on the decision from the court in *Aminga v Cabinet Secretary Ministry of Education, Science and Technology & 2 others* [2023] KEELRC 32 (KLR) where the court observed:- ‘8.The Petitioner was employed in the year 1993 and had remained in the service of the Respondents until his sixtieth (60) birthday which fell on July 23, 2019. It is his case that he developed an eye problem on or about the year 2017, and was registered as a person with disability on January 12, 2017.

9. That in addition to the registration by the National Council for persons with disability, the Petitioner was also registered for income tax exemption on account of disability. The issue then is whether by declining the Petitioner’s application to be retired at the age of 65 years, amounts to discrimination.” The court then applied the 2020 Public Service Commission regulations and held:- “In the evidence before court, nothing shows that the Petitioner was captured in the Ministry of Education Science and Technology’s database where he served, as having been living with a disability. Further, the Petitioner declined a medical assessment commissioned by the employer aimed at Confirming his disability; and lastly, the Respondents/employer got to know of the Petitioner’s disability upon issuing him with retirement notice, hence less than three years before attaining retirement age” (emphasis given). The facts before the lower court were similar to those in *Aminga* case and the court would not fault the lower court of



upholding a decision of the court vide the doctrine of stare decisis. However, on appeal the court is not bound by the said decision.

38. The General Principle of Non-Retroactivity is that Legislation and regulations typically apply prospectively, meaning they take effect from the date of their enactment and not before. The court upheld the decision of the Supreme Court of Kenya in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others*, SCK Application No. 2 of 2011 [2012] eKLR observed that, “As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.” This principle helps ensure fairness and predictability in the law. The 2020 Public Service Commission regulations are vide Legal Notice No 3 of 28th January, 2020. Regulation 82 states:- ‘82. The Public Service Commission Regulations, 2005, are revoked.’ The regulations were dated the 14th January, 2020 and published by Stephen Kirogo, Chairperson of the Public Service Commission. It is apparent from regulation 82 that the regulations applicable to the appellant’s case were those of 2005 and not 2020. The court then deviates from the decision in *Aminga v Cabinet Secretary Ministry of Education, Science and Technology & 2 others* [2023] KEELRC 32 (KLR) which applied the 2020 regulations retrospectively and consequently, the lower court having applied the decision, was in error of the law. The court upheld the decision in the case of *Joseph Kipng’eno Belyon v Kenya Pipeline Company Limited (Cause 377 of 2021)* [2021] KEELRC 609 (KLR) (Employment and Labour) (29 October 2021) where the court observed, “The respondent submitted that the claimant is not entitled to retire at the age of 65 years because he did not meet the requirements for extension under Regulation 70 of the PSC Regulations of 2020. The said regulation provides that the mandatory retirement in the public service is 60 years or 65 years for persons with disabilities. Paragraph (2) of Regulation 70 provides that:

“ A public officer shall be considered for retirement as a person with disability if the officer -

- a) has a disability of 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 resources 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 may 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.

27. The above regulation was Gazetted on 28.1.2020 while the extension of the claimant’s retirement age was done by the letter dated 13.3.2019. The respondent did not show that the claimant did not meet the requirements for extension in the previous regulations. Consequently, I find and hold that the above regulation does not apply to the case herein because the 2020 regulations



were not intended to apply retrospectively.” The decision of the lower court is held to have been erroneous for applying the 2020 regulations retrospectively.

### **Conclusion**

38. The court found the ground of appeal on application of the 2020 regulations by the lower court, merited. The court on merit of the case found that the appellant was not certified nor registered as a person living with disability as at time of retirement, she was registered post retirement hence no employer employee relationship to sustain the claim of discrimination against the respondent. The appeal is dismissed.
39. Costs on appeal- Taking into account the status of the appellant as a person now living mental disability I make no order as to costs.
40. The file is marked as closed.
41. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Appellant – Wanjiru Kamau

Respondent: absent

