



REPUBLIC OF KENYA



**KENYA LAW**  
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**Getonto v National Police Service Commission & another (Petition  
E168 of 2021) [2023] KEELRC 174 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 174 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E168 OF 2021  
J RIKA, J  
JANUARY 31, 2023**

**BETWEEN**

**JOHN NYAKUNDI GETONTO ..... PETITIONER**

**AND**

**NATIONAL POLICE SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL, NATIONAL POLICE SERVICE .... 2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

Court Assistant: Emmanuel Kiprono

Nzaku & Nzaku Advocates for the Petitioner

Brenda Opiyo, Litigation Counsel for the 1<sup>st</sup> Respondent

Attorney-General for the 2<sup>nd</sup> Respondent

**Pleadings**

1. This Petition was lodged on the 28<sup>th</sup> October 2021.
2. It is founded on the facts on the face of the Petition; the Petitioner's Supporting Affidavit sworn on 15<sup>th</sup> September 2021; Further Affidavit sworn on 15<sup>th</sup> March 2022; and Supplementary Affidavit sworn on 3<sup>rd</sup> October 2022.
3. The 1<sup>st</sup> Respondent relies on an Affidavit sworn by its Acting Chief Executive Officer, Silas Oloo McOpiyo, on the 1<sup>st</sup> September 2022.
4. The 2<sup>nd</sup> Respondent relies on the Affidavit of the Deputy Director of Human Capital Development at the Directorate of Criminal Investigations, Francis Ndiema, sworn on 4<sup>th</sup> March 2022.



5. Parties agreed before the Court on 8<sup>th</sup> March 2022, that the Petition proceeds by way of Written Submissions, which they confirmed to have filed and exchanged at the last appearance in Court, on 29<sup>th</sup> September 2022.

**Petition.**

6. The Petitioner was employed by the Kenya Police as a Police Officer in 1984. He was attached to the Criminal Investigations Department [CID].
7. In 1996, he was stabbed on his right hand wrist joint by a suspect, while he was in the course of apprehending the suspect.
8. He states that he was subsequently paralyzed on his hand, and suffered permanent physical disability.
9. Through the Human Resource Policies and Procedures Manual for the Public Service 2016, mandatory retirement age was set at 60 years, while that for Persons Living with Disability, was set at 65 years.
10. The Petitioner received a Notice of Retirement dated 21<sup>st</sup> May 2019 from the 1<sup>st</sup> Respondent. He was informed that records held by the 1<sup>st</sup> Respondent indicated he was born in 1960. He was approximately 59 years old at the date of the Notice. He would be retired on 1<sup>st</sup> July 2020, at the age of 60 years.
11. The Petitioner requested the 1<sup>st</sup> Respondent, that he is retired at the age of 65 years, instead of 60 years, being a Person Living with Disability.
12. He enlisted the aid of the National Council for Persons With Disabilities [the Council], who wrote a letter to the 1<sup>st</sup> Respondent's Chairman, dated 24<sup>th</sup> June 2020, confirming that the Claimant was a Person Living With Disability, and was entitled to serve until he was 65 years.
13. The Council issued him a certificate dated 5<sup>th</sup> May 2020, certifying that the Claimant was living with disability.
14. On receiving the request for extended service from the Petitioner, the Director of Criminal Investigations sought guidance from the 2<sup>nd</sup> Respondent, through a letter dated 5<sup>th</sup> May 2020. The Director states that, " ...we are devoid of clear policy on the issue, and requests your guidance in the matter. Without objecting to the request and being cognizant of the challenges posed by his current physical condition, and further being informed of his advanced age and the prevailing Covid-19 situation, his further retention in the service may not be feasible due to the demanding nature of Police work."
15. The Petitioner was not granted extension, and states at paragraph 32 of his Petition, that he was "knocked off the Payroll on 30<sup>th</sup> June 2020, rendering him economically incapacitated, being a Person living with disability."
16. He petitions the Court for the following orders: -
  - a. Declaration, that the conduct of the Respondents, is contrary to and inconsistent with the provisions of Article 10 of *the Constitution* of Kenya.
  - b. Declaration, that the Respondents violated the constitutional rights of the Petitioner, in particular Articles 20[1] and [2], 24[1], 25 [c], 29[d] 41[1] 43[e] and 50[1] of *the Constitution*.
  - c. Certiorari, calling to this Court and quashing the decision of the 1<sup>st</sup> Respondent to send the Petitioner to retirement before his attainment of 65 years of age.



- d. Certiorari, calling to this Court and quashing the decision of the 1<sup>st</sup> Respondent to cut off the Petitioner [not the 1<sup>st</sup> Respondent as pleaded] from the Payroll.
- e. Declaration, that the Petitioner is entitled to all the rights and privileges accorded to a Civil Servant living with disability including the 5 years' extension of retirement age to 65 years.
- f. Mandamus, compelling the Respondents to reinstate the Petitioner to employment at the rank he was, immediately before the discontinuation of his employment by the 1<sup>st</sup> Respondent.
- g. Mandamus, compelling the 1<sup>st</sup> Respondent to restore the Petitioner to the Payroll.
- h. Mandamus, compelling the 1<sup>st</sup> Respondent to pay to the Petitioner unpaid dues including salary, allowances and other benefits entitled to him by dint of his employment from the time employment was discontinued.
- i. Compensation, for violation of Petitioner's constitutional rights.
- j. Any other order the Honourable Court deems suitable.
- k. Costs and interest.

### **1<sup>st</sup> Respondent's Response.**

17. The 1<sup>st</sup> Respondent does not dispute that the Petitioner was enlisted as a Police Officer with effect from 15<sup>th</sup> September 1984.
18. He was properly served with the Notice of Retirement on 21<sup>st</sup> May 2019, which was 1 year and 1 month-long Notice, before the actual retirement date.
19. In anticipation of retirement, he wrote to the 1<sup>st</sup> Respondent a letter dated 15<sup>th</sup> April 2019, where he mentioned that he suffered hypertension and diabetes. He never disclosed that he suffered disability. He did not at any time before retirement, raise the issue of disability arising from the 1996 incident, or any other incident. Request for transfer to Nairobi, was granted.
20. The Petitioner requested for extension of service on the ground that he suffered disability, on 6<sup>th</sup> May 2020, about 53 days to the date of the actual retirement. The certificate of the Council issued around 28<sup>th</sup> April 2020. He upon receiving the Retirement Notice, asked to be transferred to Nairobi to be with his family, disclosing that he suffered diabetes and hypertension, requiring close support of the family. He never mentioned that he suffered disability.
21. Regulations in Legal Notice No. 3 of 2020, which became effective in January 2020, state that a certificate from the Council, does not automatically qualify an Officer claiming disability, to retirement at the age of 65 years. The Public Service Human Resource Policy should be read in the context of Legal Notice No 3 of 2020.
22. The Petitioner was clearly outside the 3-year rule, and there were no special circumstances, to warrant extension of retirement age from 60 years to 65 years.
23. The 1<sup>st</sup> Respondent under Section 10 [1] [a] of the *National Police Service Commission Act*, 2011, has an obligation to assess claims of disability put forward by Police Officers. Consideration by a Special Medical Board would give a more realistic and verifiable facts of the present reality.
24. The 1<sup>st</sup> Respondent constituted a Special Board to this end, as there were over 900 Police Officers claiming to be living with disability. By the time the Board deliberated on the subject countrywide, the Petitioner had already been retired.



25. The 1<sup>st</sup> Respondent holds that the Petition is inconsistent with Regulation 70 of the Public Service Commission Regulations, as published in Legal Notice No. 3 of 2020, effective January 2020. The Petitioner's request for extension could only be processed in accordance with the principles therein.

### **2<sup>nd</sup> Respondent's Response.**

26. The 2<sup>nd</sup> Respondent, through Francis Ndiema, confirms that the Petitioner was a Police Officer, attached to the Directorate of Criminal Investigations, effective from 15<sup>th</sup> September 1984, a period of 36 years.
27. He was stationed at Lang'ata Police Station as of 21<sup>st</sup> May 2019, when he was issued a Notice of Retirement dated 21<sup>st</sup> May 2019. He was required to retire upon attainment of the mandatory retirement age of 60 years, on 30<sup>th</sup> June 2020.
28. He requested for extension on 6<sup>th</sup> May 2020 on the basis that he was certified by the Council, as a person who had disability.
29. He alleged to have suffered injury resulting in disability, while in execution of his duty, in 1996. He ought to have followed the laid-down procedures, in relation to sick/injured Police Officers, instead of approaching the Council. There was no medical report showing that the Petitioner suffered paralysis. He ought to have incorporated the Directorate of Criminal Investigations, while seeking certificate from the Council. He ought to have appeared before the National Police Medical Board for assessment. The National Police Service [Recruitment and Appointments] Regulations, 2015, required the Petitioner to appear before the Board, so that it could be determined if he was suitable to continue serving.
30. The 1<sup>st</sup> Respondent directed that all requests regarding extension of service of Officers living with disability, would be tabled before a Special Board. The letter containing this advice is dated 16<sup>th</sup> March 2021. The Directorate could not deviate from the procedure which applies uniformly to other Officers living with disability.

### **Submissions.**

31. Petitioner submits that Section D21 of the Human Resource Policies and Procedures Manual for the Public Service, 2016 provides for mandatory retirement age for all Officers in the Public Service at 60 years, and for Officers with disability at 65 years, "or as may be prescribed by the Government from time to time." 65-years retirement limit is only qualified by this provision- or as may be prescribed by the Government from time to time.
32. There is no room for other Government agencies to formulate their own rules to replace the above provision in the Human Resource Policies and Procedures for the Public Service.
33. It is not even necessary for an Officer living with disability to apply for extension. 65-years retirement age applies so long as an Officer is living with disability.
34. Delay in being certified by the Council as a person living with disability, ought not to prejudice the Petitioner. He cites this Court's decision in Margaret Martha Byama v. Alice A. Otwala & 3 Others [2016] e-KLR, where the Court found that it was the right of the Claimant to plead her disability, to continue serving until the age of 65 years.
35. The Court in the case of Byama v. Otwala & 3 Others above, declared that registration by the Council is simply to create a database for purposes of operationalizing the rights conferred by Persons



With Disability Act, 2003 and the Constitution. Registration does not confer those rights which automatically exist, once a person fits the definition of disability contained in the Act.

36. On Regulation 70 [2] [b] of the Public Service Commission Regulations 2020, the Petitioner concedes that it requires a Public Officer seeking to retire at the age of 65 years, to be registered in the public body's human resource database, as a person with disability, at least 3 years before the date of retirement.
37. But, the Petitioner submits, the Regulations came into force at the beginning of the year 2020, while the Petitioner was slated for retirement on 1<sup>st</sup> July 2020. He could not have been registered in the 1<sup>st</sup> Respondent's database as a person with disability, at least 3 years prior to retirement. The Petitioner relies on the decision of this Court in Engineer Samuel Ogola Ogege v. Cabinet Secretary, Ministry of Transport and Public Works [State Department of Infrastructure] & Another; Public Service Commission [PSC] & Another [Interested Party] [2022] e-KLR, where it was determined that the Public Service Commission Regulations 2020, which came into force on 28<sup>th</sup> January 2020, cannot apply retroactively. The Court held further, that Petitioner Ogege, became eligible to retire at the age of 65 years, upon being diagnosed with permanent disability by a medical practitioner in the year 2014, "which position was validated by the Council as a matter of procedure and policy on 20<sup>th</sup> June 2019."
38. The Respondents submit that retirement at the age of 65 years, is subject to Legal Notice No. 3 of 2020 containing the Public Service Commission Regulations, which came into force in January 2020. The Petitioner does not explain why he waited until his retirement, to seek extension of 5 years.
39. The Respondents invoke this Court's decision in Idle Alas Sheikh Hassan v. National Police Service Commission & 3 Others [Petition E032 of 2022], where the Court upheld the Public Service Commission Regulation of January 2020, requiring Officers wishing to retire under disability provision at the age of 65 years, to bring their disability to the attention of the Employer at least 3 years before retirement.
40. The issues are whether the Petitioner is a Person Living with Disability; whether he merited retirement at the extended age of 65 years; whether by declining the Petitioner to retire at the age of 65 years, the Respondents violated the Petitioner's constitutional rights as pleaded; and whether the Petitioner merits the remedies claimed.

#### **The Court Finds: -**

41. It is common position that the Petitioner was employed by the Kenya Police Service as a CID Officer for 36 years, commencing 15<sup>th</sup> September 1984. He was retired on 30<sup>th</sup> June 2020, upon attainment of the mandatory retirement age in the Public Service, of 60 Years.

#### **Disability.**

42. The Petitioner was knifed and injured on his right hand by robbery suspects at Runyenjes in Embu, while apprehending the suspects, in December, 1995 [not 1996].
43. The incident is confirmed in reports made from the Petitioner's Police Station at Runyenjes by the OCS, to the O.C.P.D Embu, and to the Provincial Police Office Eastern Province.
44. The Employer prepared a Notice of Accident Causing Injury to, or Death of a Workman, under the Workmen's Compensation Act, which is dated 21<sup>st</sup> June 1996. The Notice contains a Medical Report, signed by a Medical Practitioner. It was confirmed by the Medical Practitioner, that the Petitioner sustained permanent incapacity. The Medical Practitioner assessed the percentage of permanent incapacity, at 10%. This was in the year 1996 shortly after the Petitioner was knifed by robbers.



45. Permanent incapacity of any degree, in the view of the Court, fits within the description of the term ‘disability,’ contained in Section 2 of the *Persons With Disabilities Act*, Cap 133 the Laws of Kenya, which is – a physical, sensory, mental or other impairment, including visual, hearing, learning of physical incapability, which impact adversely on a person’s social and economic participation. This definition is replicated at Section 2 of the *Employment Act*. Article 260 of *the Constitution*, has a slightly expansive definition- disability includes 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 long-term effect, of an individual’s ability to carry out ordinary day-to-day activities.
46. The terms ‘disability’ and ‘incapacity’ overlap. Although in theory the terms are distinguishable, they overlap and involve physical or mental impairment. ‘Disability’ refers mainly to a functional limitation in ordinary activity. ‘Incapacity’ relates to inability to work or work optimally, because of a medical condition. The Petitioner became physically impaired, and was not able to use his hand optimally, after the attack in 1995. The Doctors who examined him at Mama Lucy Kibaki Hospital on 22<sup>nd</sup> April 2020, found that the Petitioner suffered musculoskeletal tissue atrophy, and endured pain while lifting heavy objects. The Medical Report prepared in 1996, had similar diagnosis. The diagnoses in either case, fit within both terms, ‘disability’ and ‘incapacity.’
47. The Employer in this Petition, had medical records from the inception, in 1996, to confirm that the Petitioner was living with disability. The Medical Practitioner engaged by the Employer after the Petitioner was injured, confirmed that the Petitioner sustained 10% permanent incapacity.
48. It was needless to require the Petitioner to undergo other medical processes, such as that overseen by a Special Medical Board, to ascertain disability. The Respondents in any event, submit that the Special Medical Board was launched on 13<sup>th</sup> May 2021, after the Claimant was retired without the benefit of any form of a hearing.
49. The Medical Report [1996] states that the Petitioner endured pain in the right elbow joint, after long hours of work. The Medical Report prepared by a medical team at Mama Lucy Kibaki Hospital, confirmed incapacity, stating that the Petitioner had challenges in making firm grip, lifting and carrying heavy luggage. This was an Officer who was injured while in the course of service, who served with disability for 25 years, and who should have continued serving for 5 more years.
50. Was it necessary for the Petitioner to be taken through additional medical processes, to establish disability? Did not the Police Service, generate the initial medical report in 1996, which confirmed some degree of permanent disability?
51. The Court is satisfied that the Petitioner was a person living with disability, arising from his injury in the course of duty, from 1995.
52. The Court adopts the Judgment in the case of *Byama v. Otwala & 3 Others*, cited above, in finding that the Petitioner’s disability rights, accrued automatically, when he was shown to have sustained permanent incapacity. Certification by the Council, as held in the case of *Engineer Samuel Ogola Ogege*, was simply a matter of procedure and policy.

### **Retirement at 65 years.**

53. The submission that the Petitioner ought to have notified the 1<sup>st</sup> Respondent about his disability, at least 3 years before retirement, in accordance with Public Service Regulations of 28<sup>th</sup> January 2020, is without merit.



54. The Regulations were not in force, 3 years before the Petitioner was retired. They could not, as held in the case of Engineer Samuel Ogola Ogege, apply retroactively. The Petitioner was to retire on 30<sup>th</sup> June 2020. The Regulations came into force 6 months before, in January 2020. How was he to give notice of his disability to the Employer, at least 3 years before retirement?
55. The Court agrees with the Petitioner that persons living with disability, need not apply for extension of the date of mandatory retirement. Section D21 of the Human Resource Policies and Procedures Manual for the Public Service, 2016 states that the mandatory retirement age for persons with disabilities is 65 years. The provision is only qualified by prescriptions the Government may make, from time to time. The Policy does not require an application to be made for retirement at the age of 65 years. Once the Employer is aware that the Employee suffers disability, retirement age is 65 years, and there is no requirement to lodge an application for extension. Extension is given automatically, under Section D21 of the Manual, so long as one suffers disability. Retirement at the age of 65 for persons with disabilities, is not a discretionary benefit, to be determined by the Employer, upon an application of extension, made by an Employee.
56. The letter dated 5<sup>th</sup> May 2020 to the 2<sup>nd</sup> Respondent by the Director of Criminal Investigations laments dearth of clear policy on retirement of Officers with disability. The Directorate was reluctant to continue employing the Petitioner on among other grounds, “his current physical condition. “ It would seem that the 1<sup>st</sup> Respondent was aware about the Petitioner’s physical condition, which the Court would interpret as his disability, and did not think it wise therefore, to extend the benefit of retirement at the age of 65 years, which the Human Policy automatically grants to Officers with disability, or what the Directorate terms “his current physical condition. “
57. From the letter, it is clear that the 1<sup>st</sup> Respondent, through the Directorate, took the Petitioner’s retirement age as a matter of feasibility- that is a matter where the 1<sup>st</sup> Respondent was called to exercise discretion. “His further retention in the service may not be feasible, due to the demanding nature of Police work,” the Directorate writes. In other words, the Petitioner’s disability and old age, did not suit the demanding nature of Police work, and he would not be retired at 65 years, as he was entitled to.
58. It is illogical for an Employer to deem an Officer with disability, who is 60 years, and who is entitled to work until the age of 65 years, too old to continue serving. The existing policy would be rendered unworkable. There would be no Officer serving beyond 60 years, if such age was considered to be too advanced, to be crossed.
59. The letter also suggests to the Court that the 1<sup>st</sup> Respondent was groping in the dark on the subject of retirement of Officers with disability. A letter dated 13<sup>th</sup> October 2020 to the 2<sup>nd</sup> Respondent from the 1<sup>st</sup> Respondent, discloses that the 1<sup>st</sup> Respondent had deliberated on the subject, and consulted the Head of Public Service, who advised inter alia, that the 1<sup>st</sup> Respondent may wish to develop and enforce control measures to ensure disability is evaluated immediately an Officer suffers work-related injuries, to determine whether the Officer qualifies to retire at the age of 65 years.
60. However, as shown in this Petition, the Petitioner was evaluated by a Medical Practitioner immediately after the incident, as required by the Workmen’s Compensation Act. Part of that evaluation entailed whether the Officer suffered permanent incapacity, so that the advice by the Head of Public Service, and consequent convention of a Special Medical Board, would appear needless. Once there is Medical Report at the inception, concluding the Officer sustained permanent incapacity, there is no need for Special Medical Board for purposes of ascertaining disability.
61. The Petition is not affected by the fact that the Petitioner made an application for extension, and sought the aid of the Council, while serving his retirement notice period. The finding in *Byama v. Otwala & 3*



Others, that it was within the Petitioner's right to plead disability to continue in service, applies in this Petition. Furthermore, the Court has concluded that it was not necessary for the Petitioner to make the application for extension; and, the 1<sup>st</sup> Respondent was aware about his permanent incapacity and therefore disability, from 1996, when the first Medical Report was prepared. It was the 1<sup>st</sup> Respondent's default, in not keeping proper employment records on the Petitioner's disability, and advising him that he would retire on disability, at the age of 65 years.

62. Section 10 [1] [a] of the [National Police Service Commission Act](#), Cap 185C, allows the Commission to keep under review all matters relating to standards or qualifications required of members of the Service. The provision does not affect the role of the Public Service Commission, in crafting Human Resource Policies and Procedures, such as Section D21 of the Human Resource Policies and Procedures for Public Service, across the board. The 1<sup>st</sup> Respondent correctly advised the 2<sup>nd</sup> Respondent, that Police Officers could not be excluded from the application of the Circular on retirement, of 29<sup>th</sup> May 2012. The Respondents cannot therefore take refuge, in the argument that Section 10 [1] [a] of Commission's constitutive Act, allows it to create different disability standards for Officers, from those under the Public Service Commission / Ministry.
63. The Respondents submit that the Petitioner wrote to the 1<sup>st</sup> Respondent, upon receiving the Retirement Notice, asking to be transferred to Nairobi to be with his family in contemplation of retirement, and that he said he needed the close support of his family, because he suffered diabetes and hypertension. According to the Respondents, he did not mention disability, and latter day claim concerning disability and extended retirement date, was made in afterthought.
64. This submission is likewise unmerited, because the request for transfer, did not change the status of the Petitioner as an Officer with disability. The Petitioner was acting in accordance with the irregular advice given to him by the 1<sup>st</sup> Respondent, that his retirement age was 60 years. Disclosure that he suffered diabetes and hypertension, did not foreclose his claim of disability, on account of injury sustained in 1995, which was well within the Respondent's knowledge. It is not lost on the Court that illnesses such as disclosed by the Petitioner, diabetes and hypertension, could as well, where shown to affect an Employee's day-to-day activities, amount themselves to disability.

#### **Constitutional violations.**

65. Were Petitioner's constitutional rights violated? The Human Resource Policies and Procedures Manual for the Public Service, 2016 granted the Petitioner, as an Officer with disability, the right to work until he was 65 years. He applied for extension, but there was no response. The Directorate instead wrote to the 1<sup>st</sup> Respondent, complaining about lack of clear policy on the matter. There was no specific response to the Petitioner. He was retired at 60 years, on 30<sup>th</sup> June 2020, in accordance with the Notice of Retirement. There was no response to his request, and no reasons given for the decision to decline his request.
66. This was in violation of Article 41 of [the Constitution](#), on the right to fair labour practices. The Retirement Age Circular dated 29<sup>th</sup> May 2012 authored by Titus Ndambuki, Permanent Secretary in the Ministry of Public Service, states that retirement age for Officers with disability would be 65 years. This would ensure the affected Officers have guaranteed earnings, as a way of cushioning them, against uncertainties usually associated with retirement from formal employment. The circular is about social protection and security. It is in recognition of Article 43 of [the Constitution](#) on economic and social rights. The Petitioner's right to social security under Article 43 [1] [e] of [the Constitution](#) was severely impaired.



67. The letter dated 13<sup>th</sup> October 2020 from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent, advised that removing Police Officers with disability from the application of the Public Service Circular of 29<sup>th</sup> May 2012, would be discriminative and unfair administrative practice.
68. But 4 months before this advice, on 30<sup>th</sup> June 2020, the circular was taken away from the Petitioner, which resulted in discrimination and unfair administrative/ labour practice. The rights protected in Articles 41 and 47 were violated. The conduct of the 1<sup>st</sup> Respondent similarly impaired the rights of the Petitioner to be treated equally under the Law, as guaranteed by Article 27 of *the Constitution*.
69. The Directorate, in its letter dated 5<sup>th</sup> May 2020, indicates that it was not feasible to continue employing the Petitioner, because of his current physical condition [disability], and his advanced age. The 65 years' retirement age was not extended to the Petitioner, because in the view of the Directorate, Police work is demanding, and the Petitioner was physically incapacitated and too old to perform this work. He could not serve until he was 65 years, as granted by the Public Service Human Resource Policy.
70. Underlying this argument is discrimination on the ground of disability and age. The State, through the 1<sup>st</sup> Respondent, discriminated against the Petitioner, on the grounds of disability and age. His rights of equality and freedom from discrimination under Article 27 [4] of *the Constitution* were violated.
71. There could be more constitutional violations, direct and indirect, that the Petitioner was subjected to as pleaded, but the Court need not look at each Article that the Petitioner has pleaded.
72. The last of the violations the Court would wish to mention, is under Article 232 of *the Constitution*, which applies to the Public Service. Article 232[1] [I] [iii] demands that persons with disabilities are afforded equal opportunities, for among others advancement at all levels of the Public Service. The Respondents curtailed the Petitioner's career advancement to the age of 65 years, thereby reducing his creditable years of service by 5 years. This was in contravention of the values and principles of the Public Service.
73. The *Persons With Disabilities Act*, Cap 133 the Laws of Kenya, whose objectives among others, is to achieve equalisation of opportunities for persons with disabilities, states at Section 12, that no person shall deny a person with a disability access to opportunities for suitable employment. No Employer under Section 15, shall discriminate against a person with disability. Discrimination in employment is similarly prohibited under Section 5 of the *Employment Act*. Section 5[2] mandates Employers to promote equal opportunity in employment, and strive to eliminate discrimination in any employment policy or practice.
74. The Petitioner has established with sufficient precision, that the Respondents violated his constitutionally and legally protected, fundamental rights. He is entitled to remedial action.

### **Remedies.**

75. The Petitioner prays the Court to declare that the Respondents violated his constitutional rights. Findings to that effect have been made above, and It is declared that the Respondents violated the Petitioner's fundamental rights, identified in the findings of the Court.
76. The Petitioner prays the Court for an order of Certiorari, to quash the decision to retire the Petitioner before the age of 65 years and remove him from the Payroll. The prayer for an order of Certiorari is granted, quashing the decision of the 1<sup>st</sup> Respondent to retire the Petitioner before the age of 65 years, and quashing the decision to remove the Petitioner from the Payroll.



77. The Petitioner prays for an order of Mandamus, reinstating him, to employment at the rank he held on retirement, with all back-pay, benefits and privileges. The order is issued, reinstating the Petitioner to serve until he attains the age of 65 years.
78. He prays for compensation for violations of his constitutional rights. Having fully restored him to employment until the age of 65 years, without loss of benefits, compensation can only be considered as an alternative to reinstatement. His last gross monthly salary was Kshs. 75,000. He was entitled to serve as a person with disability until the age of 65 years. The 1<sup>st</sup> Respondent recognized that the circular 29<sup>th</sup> May 2012 was informed by the need to extend social security and protection, to persons living with disability. The extension of 5 years was granted to cushion Officers with disability against the uncertainties that come with retirement. Compensation in this case should be based on the income the person with disability should have earned for the extended period of 5 years. It cannot be argued as normally is, on prayers for anticipated salary in unfair termination claims, that to grant a person with disability compensation based on the remaining period of service, would result in unjust enrichment. The Policy on retirement at the age of 65 years for persons with disability aims at affording social security and protection to a disadvantaged category of Employees.
79. In the alternative to reinstatement and service until the age of 65 years, the Court shall therefore order that the Respondents pay to the Petitioner, compensation equivalent of 5 years' gross monthly salary, at the rate of Kshs 75,000 monthly, amounting to Kshs. 4,500,000.
80. The Respondents must write to the Petitioner within 30 days of this Judgment, indicating which option shall apply, and proceed to execute Judgment, in accordance with the option made.
81. No order on the costs.
82. Interest allowed at court rates from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED: -

- a. It is declared that the Respondents violated the Petitioner's constitutional and legal rights under Articles 27, 41, 43, 47 and 232 of *the Constitution*; Sections 12 and 15 of *Persons With Disabilities Act*; and Section 5 of the *Employment Act*.
- b. An Order of Certiorari is granted, calling to this this Court, and quashing the decision of the 1<sup>st</sup> Respondent, to retire the Petitioner before the age of 65 years, and removing him from the Payroll.
- c. An order of mandamus is granted, compelling the Respondents to reinstate the Petitioner to employment in the rank held on retirement, with all back-pay, benefits and privileges, until he attains the age of 65 years.
- d. Alternative to reinstatement, the Respondents to pay compensation to the Petitioner, equivalent of 5 years' gross monthly salary, at Kshs. 4,500,000.
- e. The Respondents to write to the Petitioner within 30 days of this Judgment, indicating which option shall apply, in satisfying the Judgment.
- f. No order on the costs.
- g. Interest allowed at court rate, from the date of Judgment till satisfaction in full.



DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,  
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31<sup>ST</sup>  
DAY OF JANUARY 2023.

JAMES RIKA

JUDGE

