



REPUBLIC OF KENYA



**KENYA LAW**  
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**Aminga v Cabinet Secretary Ministry of Education, Science and Technology & 2 others  
(Petition E020 of 2022) [2023] KEELRC 32 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 32 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E020 OF 2022  
CN BAARI, J  
JANUARY 19, 2023**

**BETWEEN**

**KEPHA MAUTI AMINGA ..... PETITIONER**

**AND**

**CABINET SECRETARY MINISTRY OF EDUCATION, SCIENCE AND  
TECHNOLOGY ..... 1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF EDUCATION SCIENCE AND  
TECHNOLOGY ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner's petition herein, is dated May 9, 2022 and filed on May 17, 2022. The Petitioner seeks the following reliefs:
  - i. A declaration that his termination from the service of the Respondent(s) was irregular, illegal, unlawful and amounted to unfair labour practices and contrary to sections 41, 43 & 44 of the [Employment Act](#).
  - ii. Rescission of the termination letter and effective re-instatement of the Petitioner to his employment with the Respondents herein in similar terms.
  - iii. In the alternative, and without prejudice to the foregoing, payment on account of salary in lieu of notice, service pay, termination benefits and compensation for loss of employment on account of five (5) years salary.
  - iv. Payment of salary in lieu of leave days earned but not taken.
  - v. Interest and costs.



2. The petition is premised on the following grounds:
  - i. That at all material time relevant to this suit, the Petitioner was an employee of the Ministry of Education, Science and Technology having been duly employed and/or engaged as such on or about the 25<sup>th</sup> day of May 1993.
  - ii. That pursuant to and upon being employed by the Ministry of Education, Science and Technology, the Petitioner was deployed to various stations where the Petitioner worked up to the period of the unceremonious and/or irregular retirement.
  - iii. That the Petitioner is a person living with disability and therefore he was expected to be accorded with all the required facilities both physical and legal for proper running of the affairs of his employer without any discrimination.
  - iv. That the Petitioner has a congenital cataract which has resulted to amyopia on the left eye, and therefore the condition has resulted into a disability which means that he was supposed to retire after attaining 65 years of age.
  - v. That pursuant to article 27(6) of the Constitution and regulation 70 of the Public Service Commission Regulations 2020, the Petitioner was supposed to retire on attaining 65 years of age.
  - vi. That the Petitioner received a letter dated 13<sup>th</sup> day of August, 2018 before attaining 65 years of age, whereby he was directed to retire on 23<sup>rd</sup> day of July, 2019, upon attaining 60 years of age.
  - vii. That the Petitioner contends that despite informing the Respondents through various correspondences that he is person living with disability, and therefore he is supposed to retire upon attaining 65 years of age, the Respondents have not reinstated him and therefore he has been discriminated on the basis of disability
  - viii. That the Petitioner has been oppressed and subjected to inhuman treatment.
  - ix. That the Respondents have abused due process of law in terminating the Petitioner.
  - x. The Petitioner contends that the termination of his employment before attaining 65 years of age in terms of the letter dated 13<sup>th</sup> day of August 2018, was irregular, unlawful and/or otherwise illegal, in so far as the Petitioner was never provided any reasons as to why he was told to retire before attaining his retirement age, in accordance with the provisions of the Employment Act, the Fair Administrative Action Act, Persons With Disabilities Act and the Constitution.
  - xi. That in the premises, the Petitioner contends that the termination of his employment therefore constitutes and/or otherwise unfair labour practice in terms of the provisions of article 41 of the Constitution, 2010.
3. The Respondents replied to the petition vide replying affidavits, sworn on different dates by Paul Kangi'ra, for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents and another by Mr Remmy N Mulati for the 3<sup>rd</sup> Respondent. The Respondents' case is THAT:
  - i. The Petitioner herein was a Clerical Officer (1) Job Group "G" with the Ministry of Education, State Department for Early Learning and Basic Education, and had been deployed to Gucha Sub-County, Kisii County.



- ii. The Petitioner was served with a retirement notice Ref No: 1979138820/133 dated August 13, 2018, and was expected to retire effective July 23, 2019, having attained the age of 60 years.
- iii. The records indicate that the Petitioner suffered Congenital Cataract which resulted to Amblyopia; lack of vision on the left eye and the right eye has vision of 6/24, thus considered a person living with disability and subsequently registered with the National Council of Person with Disabilities under Reg No NCPWD/P/42xxxx.
- iv. Following the retirement notice, the Petitioner wrote to the Public Service Commission, the 3<sup>rd</sup> Respondent herein, letters dated April 18, 2019 and July 16, 2019, seeking an extension of service in accordance with Circular No MPS/HRM/2/2/VOL 11 (21) of May 29, 2019, allowing persons living with disabilities to retire at the age of 65 years.
- v. Following the 3<sup>rd</sup> Respondent's request for comments, the Ministry of Education, State Department of Early Learning and Basic Education through the Cabinet Secretary wrote back giving comments for necessary action vide letters dated May 16, 2019 Ref No 1979138820/(143) and August 19, 2019, Ref No 1979138820/(145).
- vi. That matters human resource within the public service is the responsibility of the 3<sup>rd</sup> Respondent.
- vii. The Respondents deny aspect of discrimination, unfair termination, irregularity/illegality or malice while discharging their official responsibilities as enumerated in the petition.
- viii. The petition would therefore be premature, considering that the 3<sup>rd</sup> Respondent is yet to establish, confirm or reject the Petitioner's application for extension of service on grounds of being a person living with disability.
- ix. The Petitioner has failed to prove a *prima facie* case with a high likelihood of success.

### Reply by the 3<sup>rd</sup> Respondent

- i. That Section 80 of the [Public Service Commission Act](#), provides that a Public Officer who has attained the age of majority shall retire from service with effect from the date of attaining the mandatory age as may be prescribed in the Regulations.
- ii. The Public Service Commission Regulations, 2020, in elaborating on the mandatory retirement age in the public service, provides under Regulation 70(1) that the mandatory retirement age in the public service shall be sixty years (60) and sixty-five years (65) for Persons with Disabilities.
- iii. That whereas the Applicant is duly registered by the National Council for Persons with Disabilities, he does not meet the requirement under regulation 70(2)(b) of the [Public Service Commission Regulations, 2020](#), which states that for a public officer to retire as a person with disability, they need to have been registered in the Human Resource data base as a person with disability for at least three years before the date of retirement.
- iv. That Persons with disabilities enjoy tax exemption under the [Income Tax Act](#) and from the evidence presented by the Petitioner, his application for tax exemption was done after receiving the retirement notice.
- v. That the Commission received a request from the Petitioner herein vide letters dated May 16, 2019 and August 19, 2019, through the Authorized Officer in which the Petitioner sought the Commission's



- approval for an extension to continue being in service up to the age of 65 years, on account of an alleged disability.
- vi. That the Commission in its 2591<sup>st</sup> Meeting held on August 14, 2019, expressed concerns that the process of registration of persons with disability was being abused and hence there was need to streamline and regulate the assessment and registration of officers with disability.
  - vii. That the Commission resolved that there be a two (2) months moratorium on processing cases of public officers with disability to enable the Director of Medical Services and Secretary to the Council of Persons with Disability to develop guidelines on assessment and registration of public offices with disabilities.
  - viii. That the Commission in its 2595<sup>th</sup> meeting held on October 2, 2019, while addressing the issue of approval of retirement age of officers from various ministries including the Petitioner, referred the matter to the Committee on Terms and Conditions of Service for analysis and recommendation to the Board.
  - ix. That the Commission in its 2654<sup>th</sup> meeting held on February 3, 2021, observed that the Commission had put on hold the consideration of cases of approval of retirement age for Persons with Disabilities pending submission of policy guidelines on registration by the National Council of Persons with Disabilities thereby leading to the piling up of cases.
  - x. That the Commission then resolved that the pending cases be forwarded to Terms and Conditions of Service Committee for consideration to facilitate decision by the Board on a case by case basis.
  - xi. That vide a letter dated April 26, 2022, the Public Service Commission in order to expedite the processing of the pending applications for extension of retirement age, wrote to the Principal Secretary, Ministry of Health referring all the cases to the Director of Medical Services for reassessment and verification of the disability status in compliance with Regulation 70 of the Public Service Commission Regulations, 2020.
  - xii. That before the Commission could consider the request by the Applicant as per the foregoing legal provisions, the Petitioner on May 9, 2022, filed ELRC Petition E020 of 2022 in the Employment and Labour Relations Court at Kisumu.
  - xiii. That Section D.21 of the *Human Resource Policies and Procedures Manual for the Public Service, 2016*, provides as follows with regards to the mandatory retirement age in the service:

“ All officers shall retire from the Service on attaining the mandatory retirement age of 60 years, 65 years for persons with disabilities and/or as may be prescribed by the government from time to time.”
  - xiv. That guided by regulations 70(2), (3) & (4) of the *Public Service Commission Regulations, 2020*, the Commission still considered the Petitioner’s request and having reviewed the contents of the request and the documents submitted in support thereof, there was doubt as to the Petitioner’s disability.
  - xv. That consequently, pursuant to the provisions of regulation 70(3) of the *Public Service Commission Regulations, 2020*, the Commission decided to subject the Applicant to a second medical assessment before a panel consisting of a representative of the Commission and three eminent doctors appointed by the Director-General of Health. In this regard, the Commission did a letter to the Ministry of Health requesting that the Director-General for *Health act* in accordance with its request.



- xvi. That a panel was duly constituted as requested by the Commission and vide a letter dated July 4, 2022, the Applicant now Petitioner, was informed of the request and called via telephone on his mobile number 0714xxxxxx, and an email sent to his advocate at ochwagiadvocate@gmail.com, inviting the Petitioner to appear before the said panel on July 6, 2022, at the Spinal Injury Referral Hospital at 9.00am.
- xvii. That vide a letter dated July 6, 2022, the Chairman of the medical assessment panel informed the Commission that the Applicant neither appeared before the said panel for assessment as had been directed, nor communicated any reasons justifying his inability to attend/appear before it.
- xviii. That upon consideration of the report aforementioned, the Applicant's disability could not be ascertained by the Commission and as such his request could not be approved. Consequently, a letter dated July 28, 2022, was sent to the Applicant informing him that his request for approval for an extension to continue being in service up to the age of 65 years on account of disability had been declined by the Commission and was further informed that he was retired from the Public Service on the attainment of the mandatory retirement age pursuant to regulation 70(4) of Public Service Commission Regulations, 2020.
- xix. That the decision to retire the Petitioner from the Public Service on the attainment of the mandatory retirement age of 60 years, was done within the Commission's legal mandate after following the due process.

#### **Analysis and Determination**

4. The issues that fall for determination are:
  - i. Whether the Petitioner was discriminated on the basis of disability
  - ii. Whether he is entitled to the reliefs sought.

#### **Whether the Petitioner was discriminated on the basis of disability**

5. The Petitioner's case is that he is a person with disability duly registered as such by the National Council for Persons with Disability. The Respondents on their part contend that the Petitioner's disability could not be ascertained on account of his refusal to attend the medical assessment Board, and as such his request could not be approved.
6. Article 27(4) of the Constitution states thus on discrimination: -

“The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion conscience, belief, culture, dress, language or birth.”
7. Regulations 70 of the Public Service Commission Regulations, 2020, provides thus on retirement by persons with disability: -
  - (1) Subject to the Constitution, section 80 of the Act, any other relevant written law or a specific government policy, the mandatory retirement age in the public service shall be—
    - (a) sixty years;
    - (b) sixty-five years for persons with disability (Emphasis mine); and



- (c) such age as may be determined by the Commission for lecturers and research scientists serving in public universities, research institutions or equivalent institutions as determined by Commission in consultation with such universities, research institutions or equivalent institutions.
- (2) 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.
- (3) Where there is doubt as to the disability of a public officer, the Commission shall seek a second medical assessment from a panel consisting of a representative of the Commission and three eminent doctors appointed by the Director-General of Health and the second medical assessment shall supersede any other assessment.
- (4) A person shall not be retained in the public service on account of disability beyond the mandatory retirement age without the approval of the Commission.
- (5) ...
- (6) ...“
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.
10. Retirement at the age of 65 years for persons with disability, is an express provision of regulation 70 (1) (b) of the *Public Service Commission Regulations, 2020*.
11. There are however instances when this express provision is impeded. For starters, the nature of the disability has to be of a permanent nature that can be perceived by significant sectors of the community and which should have a substantial impact on the ability of the public officer to carry out ordinary day to day activities of his job.
12. Secondly, it is a requirement that the applicant 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, and lastly, in



the event of doubt as to the disability of a public officer, the Commission is mandated to seek a second medical assessment before approving extension of service on account of disability.

13. 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. (See *Kinyua Felix v Ministry of Education & 2 others* [2021] eKLR)
14. For the Petitioner to prove discrimination he must prove that he was treated differently from people in the same situation as himself. The Petitioner has not proved that he was treated less favourably from other persons in similar circumstances. The Petitioner did not demonstrate that other officers in the Public Service whose disability was in doubt, and who rejected medical assessment had their services extended.
15. For the reasons foregone, it is my considered view that the Petitioner does not meet the requirements for enactment to retire at the age of 65 years on account of disability.
16. To qualify for extension of service, a Medical Board has to satisfy that indeed a Public Officer is living with a disability. The Petitioner's failure to attend the Medical Board for assessment denies him the opportunity to claim discrimination.
17. In whole, I find the petition to lack merit and is dismissed in its entirety.
18. Parties shall bear their own costs of the petition.
19. Judgment of the court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**CHRISTINE N BAARI**

**JUDGE**

**Appearance:**

N/A for the petitioner

Mr Mwamba h/b for Ms Essendi for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents

Ms Wangeci present for the 3<sup>rd</sup> Respondent

Christine Omollo- C/A

