



**Karugu v Public Service Board of Nakuru & another (Employment and Labour Relations  
Petition E008 of 2022) [2023] KEELRC 826 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 826 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2022**

**HS WASILWA, J  
APRIL 13, 2023**

**BETWEEN**

**ANNE WAMBUI KARUGU ..... PETITIONER**

**AND**

**PUBLIC SERVICE BOARD OF NAKURU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY & HEAD OF PUBLIC SERVICE, NAKURU**

**COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner moved this court vide a Petition dated August 29, 2022 seeking for the following reliefs; -
  - a) A declaration that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's unilateral decision of retiring the petitioner vide the letter dated March 25, 2022, giving instruction that the petitioner retires on June 30, 2022 be treated as null and void.
  - b) A declaration that the respondent's decision to retire the petitioner on June 30, 2022 was done in bad faith and is a breach of national values and principles of governance, Fair Administrative Actions Act and the constitution of Kenya 2010 and the same be revoked.
  - c) That the Honourable court be pleased to issue Order that the 1<sup>st</sup> and 2<sup>nd</sup> respondents in this matter have acted in a manner that contravenes the constitution as provided for in Article 259(5)(c) of the *constitution of Kenya*.
  - d) A Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in any manner whatsoever by themselves, their officers, staff agents, servants and/or any other persons acting under their instructions from taking any further action against the Petitioner on the basis of the letter referenced NCG/HRM/STAFF/P.F/ 1968070732.



- e) That the Honourable court be pleased to issue an order to the respondents to compensate the petitioner for loss of earnings during the period of premature retirement contrary to the requirement of the law.
- f) That had the petitioner not been retired prematurely on 30 June 2022, she could have worked up to December 31, 2022, a period of six (6) month's salary since the retirement at 30<sup>th</sup> June was made in bad faith, may the Honourable court issue orders to the respondents to pay the petitioner the six (6) month's salary based on the petitioners pay as at June 30, 2022. The claimant's pay slip for June 30, 2022 shows that she was earning a total of Kshs. 140,970.00/ per month, this would mean Kshs. 845,830.00/for 6 months pay.
- g) That given that the respondents' retirement procedure is usually programmed that when a staff is honorably going on retirement he/she is given two (2) months leave, preceding the actual retirement date i.e. the petitioner in this matter could have been given this leave on October 19, 2022 and could have come back to work on December 31, 2022 to officially start her retirement process, as the situation is currently, it seems the respondents intention is to deny the petitioner this practical right. We therefore ask the Honourable court to issue orders to the respondents to pay the petitioner these two months' rightful entitlements into cash Kshs. 140,970 x 2 = Kshs. 281, 940.00/-.
- h) That after the leave the petitioner would have gone back to work on December 30, 2022 to do clearance.
- i) That the Honourable court issue orders to the respondents to show the claimant all her rightful entitlements as provided for by the pension scheme where the respondents had been paying to the claimant all her monies in respect to such schemes and that may the petitioner be properly issued with every required statements in respect to her savings in the scheme.
- j) That the court issue orders to the respondents to pay the petitioner salaries equivalent to 12 months' gross salary given that their actions put the petitioner into psychological anxiety, a situation which could not have occurred had the respondents handled this matter soberly i.e. section 49(1)(c) of the employment Act gives compensation to workers who are unfairly mistreated and their employment services are terminated unfairly; 12 months' gross salary. Thus Kshs. 140,970.00 x 12 months = Kshs. 1,691,640/ as compensation for unfair and premature forced retirement for no reasonable cause.
- k) That the respondents pay the costs of this petition.

**Petitioner's case.**

2. The facts of this case are that the sometimes on the March 25, 2021, the Respondent's staff/agent, One Mr. Moses Bii wrote a letter reference number NCG/HRM/STAFF/P.F/ 1968070732 dated March 25, 2021, notifying the petitioner that she was due to retire on the June 30, 2022.
3. On the same day she received another letter from Mr. P. K Rono, another Respondent's staff, reference number NCG/HRM/STAFF/PF/196807032 stating that she was due to retire on December 31, 2022.
4. That the letter brought confusion on her actual date of retirement and she contacted her in charge one Dr. Wainaina to give direction on the issue but the said Officer re-directed her to Mr. Moses Bii who refused to talk to her and clarify on the confusion brought by the said letters.



5. She states that before this anomaly she had been requested by the Respondent to supply them with a copy of her Birth certificate which she supplied as such the Respondents were better placed to capture the correct date of her birth and subsequent retirement.
6. According to the petitioner, her correct age of retirement is supposed to be on the December 31, 2022 and not June 30, 2022, following her date of birth which is December 31, 1962. She stated that by failing to retire her at the correct age, the Respondents violated her rights under Articles 41, 47 and 50 of the Constitution and Section 4 the fair administrative actions Act.
7. Further that by not seeking clarification from her on the said matter and further not taking in the verbal notification from the Petitioner on the allegation in letter referenced NCG/HRM/STAFF/P.F/1986070732 and acting upon the same unilaterally, violated the right to due process as envisaged under section 41 of the Employment Act and their actions are therefore unjustified as the same are in violation of the provision under the Civil Servants Act that caps the mandatory retirement age at 60 years.
8. She contends that by failing, refusing and/or neglecting to summon the Petitioner, the 1st and 2nd Respondents acted in an impartial manner towards the Petitioner and the same is in violation and inconsistent with Articles 47,50(7) and 236 of the Constitution of Kenya.
9. Furthermore, that by acting in the manner that they did, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents over-stepped on their mandate by actually usurping the Constitutional and statutory functions and the same is in violation of and inconsistent with Article 10 of the constitution and section 59 of the County Government Act.

#### **Respondents' case**

10. The Respondent entered appearance on the September 8, 2022 and filed a replying affidavit deposed upon on the September 15, 2022 by Moses Bii, the Acting Director, Human Resource officer.
11. In the said affidavit, the affiant states that, indeed the applicant was employed as Kenya Enrolled Community Nurse(KECN) under job group F with effect from 1<sup>st</sup> July 1986. Together with the invitation letter was Form PSC 2 which the applicant filled declaring her age, the date, month and year of birth, which declared it as 1962 without any specific date or month.
12. He states that as per the records, the applicant was to retire on June 30, 2022 as such, he, on behalf of the 2<sup>nd</sup> Respondent, wrote the letter of March 25, 2021, notifying the applicant of her upcoming retirement. In addition that the Respondent received a circular reference no. DPM- PA/5/7 Vol LII(170) dated 25 the September, 2008 which reiterate that the date of retirement is the one that had initially been declared by any employee without any amendments.
13. It is the affiant's averments that the applicant ought to have indicated the correct date when filling in Form PSC 2 and therefore that she is the author of her own misfortune, who should not be allowed to benefit from her own negligence, dishonest and casual attitude towards her employment.
14. He states that the applicant has been using a national Identity card which shows her date of birth as 1962 and not the one which was issued on the November 27, 2019. He added that the variance in retirement age appearing in the applicant's pay slip of January, 2022 and February, 2022 was due to an honestly mistake which occurred due to the reading of Circular reference number PSC/ADM/13(9) which has since been determined to be flawed.
15. He stated further that the orders sought are not capable of being granted because the action the applicant is seeking to restrain has already occurred as such has been overtaken by events.



16. Direction were taken on the January 24, 2023 for the Petition to proceed by written submission with the Petitioner filing on the February 22, 2023 and the Respondents on the March 9, 2023.

#### **Petitioner submissions.**

17. The petitioner submitted on Four issues; whether the Petitioner’s constitutional rights were violated, whether the petitioner was prematurely retired, whether she is entitled to reliefs sought and who should bear the costs of this case.
18. On the first issue, the petitioner submitted that she was born on December 31, 1962 and her retiring age should be on December 31, 2022, thus the move by the Respondent to retire her early violated her right to life, social and economic right and right to Fair administrative action. It was submitted that the move by the Respondent to retire the petitioner earlier is tantamount to unfair termination and in violation of Section 41, 43 and 45 of the Employment Act. In this they relied on the case of Walter Ogal Anuro v Teachers Service Commission [2013] eklr.
19. The Petitioner also cited the case of Republic v Judicial Service Commission & 2 others ex parte, Hon Judge Erastus Githinji, where the it was held that when determining the retirement age of a public servant the Birth certificate is the determining factor and not the National identity card. So that in the event of any discrepancy, the certificate of birth prevails. On that basis, the petitioner submitted that her birth certificate indicate that she was to retire on December 31, 2022 and not June 30, 2022. This fact was reinforced by the public service Commission vide the Notice reference number; PSC/ADM/13(9) dated November 19, 2020 which was determined in the case Republic v Judicial Service Commission & 2 others ex parte, Hon Judge Erastus Githinji (Supra) and stated that the birth certificate is the determining factor when retiring employees.
20. From the foregoing, the petitioner submitted that it has proved her case to the required standard and prayed for all the prayers in the Petition to be allowed as prayed.

#### **Respondents’ Submissions.**

21. The Respondents submitted on only one issue; whether the Respondents have violated the constitution and the applicable circulars in retiring the petitioner on June 30, 2022.
22. The Respondent submitted that the petitioner when filling the employment acceptance form, indicated her years of birth leaving the date and the month blank. Furthermore, that her national Identity card taken in 1996 has only the year of birth with no date and month of birth indicated therein, therefore that the Respondents who were furnished with the birth certificate after the notice was served on the Petitioner were not in a possession to tell the date of the birth and capped it at on June 30, 2022. In support of this argument, the petitioner relied on the case of Abdinoor Sheikh Takoy v Kenya National Highways Authority[2022] eklr , where the Court face with a similar issue held that;

“It is my view that the Respondent was within its rights to use the date of birth in its records to determine the date of compulsory retirement for the Petitioner in view of the fact that he had not, during his long service spanning 1986 to 2020 when he received the retirement notice, informed his employer of any change in the particulars of his date of birth. I find that the Petitioner has not proved any breach of his constitutional rights to warrant the grant of any of the prayers sought in the petition. Specifically, the Petitioner failed to prove that his date of birth as contained in his records of employment held by the Respondent and which were voluntarily provided by him at the time of retirement was not his actual date of birth”



23. The Respondent also relied on the case of *Daniel Wambugu Ngururi v Teacher Service Commission* [2020] eKLR where the Court held that:-

“in this case, the claimant only obtained his Birth Certificate on June 28, 2012 and only notified the respondent vide letter dated December 27, 2016 after the notice to retire issued on April 6, 2016. Based on the circulars and regulations applicable at the time, without the respondent having the knowledge of the Birth Certificate issued following its notice to the claimant, the court finds no illegality. The respondent acted rationally, within reason and the decision taken to retire the claimant was legitimate.”

24. Similarly, that in this case, the Petitioner only furnished the Respondent with her birth certificate after the notice of retirement was served upon her. Ascertaining that indeed the actions of the Respondent was not marred with malice as claimed by the petitioner and not in violation of the Constitution and statute as claimed.

25. The Respondent submitted that in deciding the retirement date and month of the petitioner, the relied on the government circular dated September 25, 2008 which was referenced number PA/5/7 Vol L11 (170) which declared the date appearing on the document initially filled by the employment as supreme and to be used in calculating the retirement date.

26. The Respondent submitted further that the petitioner relied on the circular reference number PSC/ADM/13(9) stated in the case of Abdinoor sheikh Takoy (Supra) which was specially addressing the party in that one case and not to be applied to all Civil servants.

27. It was also submitted that the allegation by the petitioner that her retirement amounts to unfair termination under the *Employment Act* if flawed, because the said employee was lawfully retired upon reaching the retirement age and in accordance with the law. On that basis, the Respondents urged this Court to dismiss the petition herein with costs.

28. I have examined all evidence and submissions of the parties herein, the contention between the parties herein is on the exact date of retirement of the petitioner herein. From the proceedings herein the claimant was employed by the respondent in 1986. She filed an employment form in which she indicated her date of birth as 1962. No month or date was indicated. She never proceeded to notify her employer of any other details on her birth date.

29. The claimant also submitted her ID card which also showed her date of birth as 1962. On 25/3/2021 the claimant was notified that her due date of retirement was on June 30, 2022 as per existing service regulations. Despite the notice served upon her on 25/3/2021, it is only on 8/6/2022 – almost a year later that she wrote to the respondents contending that her retirement age was not June 2022 but December 2022.

30. She later produced a birth certificate indicating that her date of birth is December 31, 1962 but the date on which this certificate was issued is indicated as 6<sup>th</sup> January with no year shown. No exact year of issue is indicated making the document also suspect.

31. It is true retirement age is the date before 60<sup>th</sup> birthday. In the case of the claimant had she brought supporting documents that she was born on January 31, 1962 then she would have retired on December 31, 2022 and not June 2022.

32. The claimant never brought to the respondents the documents alleged and she only obtained an incomplete birth certificate and showed to the respondents after the decision to retire her had been made.



33. In my view if indeed the claimant had evidence of a birth certificate, indicating when she was born, nothing barred her from submitting it to the respondents.
34. She also received the notice a year in advance but chose to sit back and only complained at the tail end of the notice period. She is indeed guilty of laches and this court cannot come to her aid.
35. With the doubt created on the birth certificate presented in court and the delay involved, it is my finding that the claimant had not established her case as required.
36. I find her case lacks merit and the same is dismissed accordingly with costs.

**Dated, signed and delivered in open Court this 13<sup>TH</sup> day of APRIL, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

**Kihoro for respondent – present**

**\*\*Claimant – absent**

**Court assistant - Fred**

