



REPUBLIC OF KENYA



**Midega v Kenya Electricity Generating Company Limited (Petition
E196 of 2021) [2023] KEELRC 922 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 922 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E196 OF 2021**

MN NDUMA, J

APRIL 13, 2023

BETWEEN

JOHN OUMA MIDEGA CLAIMANT

AND

KENYA ELECTRICITY GENERATING COMPANY LIMITED ... RESPONDENT

JUDGMENT

1. The petitioner filed suit on 1st December, 2021 seeking an order in the following terms:-
 - (a) That a declaration be made that the Petitioner's right not to be discriminated against under Article 27(4), (5), (6) and (7) of the Constitutions of Kenya and Article 7 of the Universal Declaration of Human Rights had been violated.
 - (b) That a declaration be made that the failure by the Respondent to extend the petitioner's Retirement age from 60 years to 65 years in total disregard of the stated Government policy amounted to a violation of his right not to be discriminated against on the grounds of health, age and disability.
 - (c) That a declaration be made that failure by the Respondent in recognizing the Petitioner as a disabled person pursuant to the persons with Disabilities Act No. 14 of 2003 is a discrimination against the petitioner and a violation of his constitutional rights.
 - (d) This Honourable Court be pleased to issue an Order that the petitioners costs be paid by the 1st Respondent.
 - (e) This Honourable Court be pleased to issue such further or other orders(s) as it may deem just and expedient for the ends of justice.



Factual Basis

2. The petitioner states in the petition and statement of facts that on or about the year 1990, he was employed by the Respondent as a Senior Plant Operator. That he was promoted to the position of Assistant Supervisor at a monthly basic salary of Kshs.175,046 and other allowances adding up to Kshs.330,427.83 per month.
3. That on 13th May, 2015, as a result of an accident in the course of employment the respondent incurred leg injury and back injury. That on 18th February, 2021, Kenya Revenue Authority (KRA) granted Tax exemption to the petitioner under the law as it was satisfied after all medical checks and evidence presented before it that the petitioner has a permanent disability as a result of the said accident. That KRA provided the petitioner with a Tax Exemption Certificate dated 18th February, 2021.
4. That the National Council for Persons With Disability issued a letter to the 1st respondent for the extension of the petitioners' retirement age from sixty (60) years to sixty five (65) years.
5. That the 1st respondent unlawfully and without any reasonable consideration and cause while knowing that the petitioner is a disabled person, served him with a notice for early retirement dated 9th February, 2021 as a normal person without disability.
6. That the petitioner acts in his own interest and public interest in that many other persons in the place of the petitioner are likely to suffer similar prejudicial treatment if the Court does not stop the unlawful trend by public institutions.
7. That the directive violates the provisions of *Persons with Disabilities Act* No. 14 of 2003. That the action also violates Article 27(4) (5) (6) and 7 of the *Constitution of Kenya* in that it amounts to discrimination and unequal treatment before the law. The Action also violates *Universal Declaration of Human Rights* recognized by Kenya as part of its Laws under Article 2 (5) and (6) of the *Constitution of Kenya*, 2010.
8. The Advocate for the Petitioner issued a demand notice to the respondent dated 6th October, 2021 to revoke the notice of retirement dated 21st April 2021 but same has been ignored by the respondent until an interdict was issued by the Court pending hearing and determination of the petition.
9. The petitioner states that he is registered as a Person with Disability in terms of Section 7(1) (c) of the *Persons with Disabilities Act* No. 14 of 2003. That Article 260 of the *Constitution* read with Section 2 of the Act supports this position.
10. That the Court grants the petitioner the reliefs sought.
11. The petitioner attached to the petition letter dated 6th June, 2021 written to the 1st respondent by National Council for Persons with Disabilities. The letter stated as follows inter alia:-

“Mr. Midiga has disability as defined under Article 260 of the Constitution 2010 and Section 2 of the *Persons with Disabilities Act* No. 14 of 2003. He is duly registered with the Council in terms of Section 7(1) (c) of the Act.

The purpose of this letter is to confirm that Mr. Midiga qualifies for the extension of retirement age from sixty (60) to sixty five (65) years in terms of the Government Circular dated 29th May, 2012 and Human Resource Policies and Procedure Manual for the Public Service of May, 2016 under Section D.21(1).”



13. The petitioner also attached letter dated 21st April, 2021 written to the petitioner by J.N. Mbugua, Human Resource Services Manager of the respondent in which the 1st respondent informed the petitioner that he would have qualified for retirement at age sixty five (65) “if your information as Persons With Disability was in our database at least three years before retirement.” The 1st respondent informed the petitioner that he stood to retire as notified on 31st December, 2021 due to the aforesaid omission.
14. The respondent has maintained the above position in its response to the petition under paragraph 14 of the statement of response to the petition dated 13th January, 2022, in which respondent avers as follows:-

“The petitioner does not qualify to retire at the age of sixty five (65) years as his database as a person with disability was not registered with the respondent three (3) years before the date of his retirement. The respondent prays that the suit be dismissed with costs.”

Determination

15. From the facts not in dispute, the petitioner sustained injuries leading to permanent disability on or about 13th May, 2015 in the course of his work. It is also not in dispute that it was not until 18th February, 2021 when KRA was satisfied after all medical checks and evidence placed before it that the petitioner was a Person with Disability. It is also common cause that the National Council for Persons with Disabilities informed the respondent on the status of the petitioner as a person with Disability in terms of the Act and the Constitution on 8th June, 2021.
16. The petitioner presented before Court Persons with Disability (PWDs) medical assessment report dated 23rd February, 2019. The petitioner did not place before Court the Certificate of registration with the Council in terms of Section 7(1)(c) of the *Act*, though the fact of registration is not in dispute. The date of his registration is not stated in the petition.
19. In terms of *Public Service Commission Act*, Regulation 70(1) on retirement age:-

70(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;
 - (c)

(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.” (Emphasis added)

20. From the facts of the case, the petitioner is registered by the National Council for Persons with Disabilities and a tax exemption Certificate from KRA was granted to him on 18th February, 2021. We do not have the date of the registration with the Council.
21. For purpose of interpreting the requirements to qualify for retirement at age 65 as a person with disability, there is prima facie evidence presented by the petitioner that he is a person with disability. It is not in dispute that the accidents that led to his permanent disability arose in the course of his work with the respondent on 9th January, 2010; Leg injury; 14th May, 2015, back injury, and Leg complication and 4th December, 2018, Leg Injury.
22. The respondent has not stated that it was not aware of these accidents and injuries that were sustained by the petitioner in the course of his duty. By dint of Work Injury Benefits Act, and Occupational Health and Safety Act, the respondent is bound to have the records of the injury sustained by the petitioner and any other employee in the course of duty.
23. The recommendation by the Ministry of Health dated 23rd February, 2019 for the petitioner to be registered as a Person with disability has not been traversed by the respondent. The Court deems this record to be one necessarily in the knowledge and record of the respondent for whom the petitioner had worked for a period of 31 years and 9 months from 16th February, 1990 up to the 9th February, 2021. When the respondent gave notice of retirement at age 60 to the petitioner, the retirement date was effective 1st January, 2022.
22. Considering that the recommendation before Court by Director General for Health for the petitioner to be registered as person with disability is dated 23rd February, 2019, and the due date of retirement at age 60 was 1st January, 2022, the Court deems this particular information to have been available to government including the respondent for purposes of regulation 70(2) (a) and (b) of the Public Service Commission Act, within 3 years before the date of retirement.
23. In any event, the proviso to regulation – 70(2) permits Public Service Commission and therefore the respondent to consider case of disability that occur less than three years before the date of retirement.
24. It would appear the petitioner obtained the registration as a person with disability less than three years to the date of retirement. The petitioner falls squarely within this proviso.
25. The respondent failed to consider the case of the petitioner in a just and fair manner considering that the injuries suffered by the petitioner occurred over time in the course of his employment.
26. The Court finds that the petitioner has satisfied the requirements to retire at age 65, and not 60 and the respondent is bound to honour that obligation in the circumstances of this case.
27. In the final analysis, the Court finds that the petition has merit and allows the same and grants the following orders:-



- (a) The Court declares that the petitioner is eligible to retirement at age 65 in terms of regulation 70(1) (b) of the Public Service Act, being a person with disability as defined under Article 60 of the Constitution and Section 2 of the *Persons with Disabilities Act* No. 14 of 2003.
- (b) The respondent is directed to extend the Petitioner’s retirement age from 60 years to 65 years, the petitioner being a person duly registered as a person with Disability under Section 7(1) (c) of the *Persons with Disabilities Act* No. 14 of 2003.
- (c) The respondent to meet the costs of the petition.

28. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF APRIL, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

N. Nyaswenta and Associates, Advocates for the petitioner

Modi & Co. Advocates for the respondent

Ekale – Court Assistant

