



**Muthamia & another v Inspector General of National Police Service & 3 others (Cause E027 & E028 of 2022 (Consolidated)) [2023] KEELRC 851 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 851 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E027 & E028 OF 2022 (CONSOLIDATED)**

**ON MAKAU, J  
APRIL 13, 2023**

**BETWEEN**

**CHARLES NGAI MUTHAMIA ..... 1<sup>ST</sup> CLAIMANT**

**SAMUEL KABERIA M'MUNYI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**THE INSPECTOR GENERAL OF NATIONAL POLICE  
SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The claimants are police officers serving in the National Police Service. While in the service, they suffered accidents and ailments which led to permanent incapacity. Accordingly they were registered as persons living with disability under *Persons with Disabilities (PWD) Act*. Under the said Act, persons registered as PWDs are entitled to extension of retirement to 65 years and to tax exemption. However, the claimants were served with notice of mandatory retirement at the age of 60 years and they brought the suits herein accusing the respondents of discrimination. They further sought the following reliefs:-
  - a. Declaration that as people living with Disability their mandatory retirement age has been extended from 60 to 65 years pursuant to the provisions of the *PWD Act* and therefore the retirement notice directing them to retire in 2022 as opposed to 2027 is illegal, unlawful, discriminatory, null and void.



- b. Permanent injunction do issue restraining the respondents from unlawfully altering the terms of employment of the claimants by retiring them before their due date in 2027.
  - c. In the alternative and without prejudice to prayer (a) and (b) above, the respondents be compelled to pay the claimants their sum equivalent to their basic salary for the 5 years upto the retirement age in 2027.
  - d. Costs.
2. The claimants filed Notice of Motion dated May 23, 2022 and obtained interlocutory injunction staying the retirement notices until the suits are heard and determined. The orders remain in force to date after the parties extended the same by consent until determination of the suit.
  3. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed defence to the suit through the State Law Office contending that the claimants did not bring to the attention of the National Police Service the alleged incapacitation since 2014 for the same to be factored in administrative process. They averred that they became aware of the said incapacitation when the claimants applied for NCPWD Card and exemption of tax. Besides the said application did not incorporate the DCI so as to appear before the National Police service Medical Board for assessment. Consequently, it was averred that the claimants failed to follow the laid down procedure in relation to sick/injured police officers while in line of duty.
  4. The respondents averred that the retirement notice was proper and the claimants ought to have retired on the stated dates. It was further averred that the claimant ought to take the mandatory retirement pending constitution of a National Police Service medical Board and review of the claimants' application for extension of retirement age.
  5. The respondent denies that the claimants have been discriminated by the retirement notice and averred that the suit is premature and an abuse of court process as there is alternative procedure for remedy provided by statute and/or regulations.
  6. The 2<sup>nd</sup> Respondent filed defence on November 14, 2022 contending that the claimants' application for extension of retirement age was a knee jerk reaction since after being registered as persons with disability, they failed to notify the employer. It averred that under Regulation 70 of the Public Service Commission Regulations, an employee is allowed to retire at 65 years provided that he is registered and placed in the data base as a person with disability at least 3 years before the date of retirement. It was averred that where the subject employee acquires registration with NCPWD or certificate of Tax Exemption after 3 years' period, such is not automatic evidence of disability.
  7. It denied the alleged discrimination and maintained that the claimants acted with indolence and contrary to the Public Service Commission Regulations which must be read with the Person with Disability Act. Consequently, it opposed the issuance of the reliefs sought by the respective claimants.
  8. The suit was disposed of by written submissions on the basis of the pleadings, the written statements and documentary evidence filed.

## **Evidence**

9. The 1<sup>st</sup> claimant Mr. Charles Ngai Muthamia, filed his written statement dated May 23, 2022. He stated that on November 12, 1983, he joined the National Police Service as a Police constable and later rose through the ranks to become Assistant Superintendent of police. His service number is 23285 and payroll number is 1983084855. He attributed his promotions to his diligence service and hard work.



10. He further stated that in the course of his service he fell ill including stomach ulcers and back problems. In 2014 he was diagnosed with cancer of gall bladder and he underwent a successful surgery whereby the entire gall bladder was removed. Thereafter he was referred to chemotherapy which continues to date. The decree of his incapacity was assessed at 33% and he was declared to be a person living with disability.
11. Again in 2015 he was diagnosed with problem of cervical spine disc extrusion and spinal cord compression at C5-C6 which persisted until he had to undergo surgeries. On February 13, 2020, he was registered as person living with disability and was issued with card number NCPWD/P/505761. As a result his retirement date was extended to 65 years. He was also granted tax exemptions as per the law and regulations.
12. He further stated that despite his retirement date having been extended to August 22, 2022 and even effected in his pay slip, the respondents served him with a Retirement Notice dated August 25, 2021 which was to take effect on August 22, 2022 when he was to attain the age of 60 years. He contended that the said notice was unlawful, illegal, unfair and discriminatory as it disregards the law and effectively reduces his term of service by 5 years. Therefore he prayed for the declaratory and quashing orders sought and in the alternative, he be paid compensation equivalent to full salary for the period of 5 years from August 22, 2022 to August 22, 2027 at the rate of Kshs 75,910.00 per month.
13. To support his case, he filed a bundle of 22 documents set out in the list dated May 23, 2022. The said document includes Appointment letter, pay slip, medical reports, registration card for PWD and correspondences between him and the employer.
14. The 2<sup>nd</sup> claimant, Mr. Samuel Kaberia, also filed a written statement dated May 23, 2022. He stated that he joined the National Police Service on 30<sup>th</sup> November 1985 as a police constable and rose through the ranks to become Inspector of police. His service number is 236142 and his gross salary is Kshs 88,750.00 per month. His retirement was to be at the age of 60 years. However, that changed after he was diagnosed with serious ailment that led to loss of his ability to speak. As a result he was only able to use a speech machine which he acquired in 2017 which he uses to date.
15. He further stated that on December 13, 2017 he was declared as a person living with disability and was registered by the relevant authority as number NCPWD/P/427232. As a result, his retirement age was extended from 60 to 65 years, hence from June 2022 to June 30, 2027. He was also given facilitation as a person with disabilities including tax exemption and the retirement age extended in the employer's records.
16. He further stated that the employer served him with Retirement Notice dated September 9, 2020 informing him that he would retire on July 1, 2022 upon attaining the mandatory retirement age of 60 years. He contended that the said notice was illegal and discriminatory as it offended the law and Regulations. The premature retirement also meant loss of income to him. He prayed for the said notice to be declared unlawful and discriminatory and be quashed. In the alternative he prayed for compensation equaling his full salary for the 5 years between July 1, 2022 and July 1, 2027 at the rate of Kshs 88,750.00 per month.
17. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' witness Mr. Abdallah M. Komesha, is the Director of Personnel DCI Headquarters. He stated in his written statement dated November 8, 2022 that the record of the 2<sup>nd</sup> claimant indicates his date of birth and 1962 and as such in line with Government Policy, his date of birth is deemed to be July 1, 1962. Hence his retirement date was July 1, 2022.



18. On September 9, 2020, the 2nd claimant was served with a Retirement notice and March 31, 2021 he applied for extension of years on the basis that he was a person living with disability registered as such by the National Council of Persons with Disabilities. However, the request was not granted and the claimant was required to proceed on his retirement.
19. The witness further stated that the claimant underwent treatment in 2014 but failed to notify the employer of the alleged incapacitation to be factored in the impending administrative processes. That he ignored the laid down police procedures in relation to sick/injured police officers while in line of duty.
20. He further stated that, in applying for NCPWD Card and tax exemption, the claimant failed to incorporate the 3<sup>rd</sup> Respondent so as to appear before the National Police Service Medical Board for assessment. The said Board is the one with the mandate of ascertaining whether or not an officer should continue service or be removed from the service on medical grounds as per the stipulated police Regulations.
21. He stated that there are many other police officers who applied for extension but they were to proceed on retirement while the request was being considered. Therefore, the alleged discrimination is not factual and the suit lacks merits.

### **Submissions**

22. It was submitted for the claimants that the retirement notices August 25, 2021 and September 9, 2020 respectively were premature, illegal, discriminatory, null and void. It was submitted that both claimants were people living with disabilities resulting from sickness and injuries during their line of duty. They were duly registered by the NCPWD and granted tax exemptions 2020 and December 21, 2017 respectively.
23. They notified their employer about their Persons with Disability status and their pay slips were adjusted to reflect their new retirement age and tax exemption. The said adjustments were done before the retirement notices were written. They relied on Regulation 70 of the *Public Service Commission Regulations, 2020* to urge that as persons with disabilities, their retirement age is 65 years and not 60 years.
24. They further submitted that the authenticity of their medical assessment has not been objected to and such their registration as PWDs was and is still valid. The claimants are public officers who are registered as PWDs and therefore they are entitled to retire at the age of 65 years and not 60 years. The respondents had acknowledged the claimants as PWDs and adjusted their pay slips to reflect their new retirement age.
25. For emphasis, they cited the case of *Margaret Martha Byama v Cosmas Mbalu Munyasya* (2021) eKLR.
26. The respondents, in their submission basically reiterated their averments in their respective pleadings and witness statement as summarized above and therefore I see no need of duplicating the same. Suffice, however, to state that reliance was placed on the case of *Hassan v National Police Service Commission & 3 others* (2022)eKLR to emphasis that registration as PWD and issuance of tax exemption certificate per se does not entitle a person to automatic extension of retirement age. The officer has an obligation of notifying the employer so as to avoid chaos in government operations, interference with budget and progression of other employees.



27. It was further submitted that the claim for alleged violation of constitutional right is not properly pleaded, and it has not been proved by evidence. Consequently, the court was urged to dismiss the suit with costs.

### **Determination**

28. There is no dispute that the claimants are police officers serving in the National Police Service. It is also a fact that the claimants suffered permanent incapacity while in the line of duty and were declared to be PWDs by a team of doctors who assessed their degree of permanent incapacity. It is also common ground that the claimants were registered as PWD by the NCPWD and were issued with registration cards followed by certificates of tax exemption. Finally, it is a fact that the claimants' pay slips were adjusted to indicate their new retirement age as August 22, 2022 and July 1, 2027 respectively.
29. The issues for determination are:
- a. Whether the retirement notices served upon the claimants were premature, unlawful and discriminatory.
  - b. Whether the relief sought should be granted.

### **Retirement Notices**

30. The retirement notice to the first claimant is dated 25<sup>th</sup> August, 2021 and it states as follows;
- “According to the records held at this headquarters, you were born on August 23, 1962. Therefore, you will be attaining the mandatory age of retirement (60 years) on August 23, 2022.
- Consequently you are hereby given retirement notice to retire from the service on August 23, 2022.”
31. The retirement notice to the 2<sup>nd</sup> claimant was dated September 9, 2020 and it started as follows: -
- “According to the records held at this headquarters, you were born on 1962. Therefore, you will be attaining the mandatory age of retirement (60 years) on July 1, 2022...”
32. The claimants wrote letters in response to the said retirement notices indicating that they are persons living with disabilities who had been assessed and declared as such by qualified medical doctors and subsequently registered by NCPWDs and also issued with tax exemptions even before being served with the retirement notices. As admitted by the defence side the said letters requesting for extension were received and they are still awaiting consideration by the National Police Service Medical Board. The medical Board has not yet been constituted to date.
33. Regulation 70 of the [Public Service Commission Regulations, 2020](#) provides that: -
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; 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 officers 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."
34. From the above express provisions, it is clear that persons with disability have 65 years as their mandatory age of retirement from the Public Service. However, the officer must fulfil three conditions in order to benefit from that extended service 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 HR database as a person with disability for at least three years before the date of retirement, although the PSC may consider cases of disability that occur less than three years before the date of retirement.
  - c. Is registered by NCPWDs and has a tax exemption certificate from the KRA as a Person with Disability.
35. In this case, the 1<sup>st</sup> claimant has both registration as PWD by the NCPWD and tax exemption certificate from KRA. He has also produced medical evidence that proves that he suffers from permanent disability that affects his ordinary day to day activities. However, it seems that he was not registered with the employer's human resource database as a PWD for at least three years before the date of retirement.
36. The claimant suffered injuries in an accident that occurred in 2011. His condition worsened with time until December 4, 2019 when he underwent medical assessment at Chuka Hospital and a recommendation made for registration as a PWD and tax exemption on ground of physical disability. The said assessment followed medical examination and Report by Dr.Soren O.Otieno of Nairobi Orthopedic and Spine Clinic on 24<sup>th</sup> November 2020 which indicated that the injuries suffered by the claimant in the 2011 accident had progressed making him grossly disabled. The degree of disability was assessed at 33% and registration as PWD was recommended.
37. It follows that, even though the injury on the claimant occurred in 2011, the same progressed with time and he continued with treatment until November 2020 when Dr.S.O Otieno recommended that disability be registered and benefits accorded to the claimant as per the law. By then, the time left before retirement under Regulation 70 above was less than 3 years.



38. Under Regulation 70 (2) (b) above, the organ with the jurisdiction to determine whether disabilities occurring less than 3 years before the retirement date is the Public Service Commission. The proviso to the said Regulation states that:-

“ Provided that the commission may consider cases of disability that occur less than three years before the date of retirement.”

39. It follows that the disability of the claimant having been ascertained less than 3 years before his retirement date, the claimant ought to have sought intervention from the Public Service Commission as per Regulation 70(2) (b) above. It is now trite law that where the statute law provides for an alternative forum for seeking remedy, that procedure ought to be exhausted before seeking court’s intervention. Therefore I decline jurisdiction in this matter because the jurisdiction of the court had been invoked prematurely.

40. As regards the 2<sup>nd</sup> claimant, his disability was ascertained in 2017 but he failed to notify the employer until he was served with retirement notice. He has not explained why he never brought his PWD status to the employer. He further did not explain why he did not notify his employer about his exemption from tax until he received the termination notice.

41. Having considered all the facts of the 2<sup>nd</sup> claimant’s case, it is clear that he met two essential considerations, that is, proof of disability and registration as Person with Disability and tax exemption. However, he fails to meet the third criterion of registration with the employer’s HR database as PWD, three years before the retirement date. Consequently, the court, with much sympathy, finds that the retirement notice was issued within the law and the claimant was not discriminated.

## **Reliefs**

42. In view of the finding that the claimants did not meet the threshold for extension of retirement age from 60 years to 65 years, I decline to declare the retirement notices issued to the claimants illegal, discriminatory, null and void. I further decline to quash the same for the reasons stated above. The alternative reliefs sought is also declined.

43. In reaching the foregoing decision, I persuaded by the decisions in *Hassan v National Police Commission & 3 others* (2022) eKLR and *Kinyua Felix v Ministry of Education & 2 others* (2021) eKLR where the court declined to grant relief to the claimants on grounds that the requirements under Regulation 70 of the *Public Service Commission Regulations, 2020* were not met. In the end I dismiss the two suits for failure to prove all the essential criteria for an officer to retire at the age of 65 years. However, considering that the claimants are Persons with Disabilities, I decline to condemn them to pay costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 13<sup>TH</sup> DAY OF APRIL, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

## **Order**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 1 April 5, 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



**ONESMUS N. MAKAU**  
**JUDGE**

