



REPUBLIC OF KENYA



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**Njaggah v Board of Directors, Water Services Regulatory Board & 2 others
(Petition E217 of 2022) [2023] KEELRC 1340 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1340 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E217 OF 2022

B ONGAYA, J

MAY 25, 2023

**IN THE MATTER OF ARTICLES 12, 19, 20, 21, 22, 23, 24, 25, 27, 28, 41, 47, 48, 50(1),
159(2)(D), 162(2) (A), 258, 259 & 260 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTION 80 OF PUBLIC
SERVICE COMMISSION ACT NO.10 OF 2017**

**IN THE MATTER OF REGULATION 70(1) (B) OF THE
PUBLIC SERVICE COMMISSION REGULATIONS, 2020**

**IN THE MATTER OF IMPLEMENTATION OF GOVERNMENT
CIRCULAR REF.NO. MSPS/HRM/2/2/2/VOL.II OF 29.05.2012**

IN THE MATTER OF THE PERSONS WITH DISABILITIES ACT NO.14 OF 2003

**IN THE MATTER OF PERSONS WITH DISABILITIES (REGISTRATION) REGULATIONS,
2009 IN THE MATTER OF THE EMPLOYMENT ACT CHAPTER 226 OF LAWS OF KENYA**

**IN THE MATTER OF SECTIONS 3 AND 12 OF THE
EMPLOYMENT AND LABOUR RELATIONS COURT ACT**

**IN THE MATTER OF RULES 3, 7 & 17 OF THE EMPLOYMENT
AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2016**

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2016

IN THE MATTER OF RETIREMENT AGE OF ENG. PETER NJAGGAH

BETWEEN

PETER NJAGGAH PETITIONER

AND

BOARD OF DIRECTORS, WATER SERVICES REGULATORY

BOARD 1ST RESPONDENT



JUDGMENT

1. The petitioner is Engineer Peter Njaggah. He filed the petition on December 15, 2022 through Nyaanga & Mugisha Advocates. He prayed for orders as follows:
 - a) A declaration that the acts and letter dated February 15, 2022 Ref No WASREB/P F/2009004(7) of the 1st and 2nd respondents complained of above are and were unlawful and infringed upon the petitioner's rights and fundamental freedoms and are illegal, null, and void *ab initio*.
 - b) A declaration that the decision of the 1st and 2nd respondents to retire the petitioner from employment as communicated in the retirement notice dated February 15, 2022 Ref No WASREB/P F/2009004(7) are illegal, null and void *ab initio*.
 - c) An order of permanent injunction to issue directly to the 1st and 2nd respondents jointly and severally restraining them from interfering with the petitioner's terms of employment as per employment contract dated November 4, 2020.
 - d) An order of prohibition to issue directly to the 1st and 2nd respondents jointly and severally barring them from acting or using the retirement notice showing the petitioner's last day of work as December 28, 2022 in the 1st and 2nd respondent's letter dated February 15, 2022 Ref No WASREB/P F/2009004(7) in making their decision to retire the petitioner herein.
 - e) An order of mandamus to issue compelling the 1st and 2nd respondents herein to unconditionally permit the continuance of employment of the petitioner as Director, Licensing, Standards and Advocacy without any loss of benefits, seniority, salary, allowances and emoluments.
 - f) A declaration be and is hereby issued that the decision of the 1st and 2nd respondents to prematurely retire the petitioner from employment 5 years before he attains the mandatory retirement age of 65 years on December 29, 2027 or in the alternative when the contract term ends on December 1, 2025 amounts to unfair or unlawful termination of employment.
 - g) Costs of the petition.
 - h) Such other reliefs as court deems it fit to grant.
 - a) The petition was based on the petitioner's supporting affidavit, the exhibits thereto and upon the petitioner pleaded as follows. On December 1, 2020 the petitioner was employed by the 1st respondent as Director Licensing, Standards and Advocacy on contract terms for a period of 5 years per the appointment letter dated November 4, 2020. The petitioner reported to the Chief Executive Officer, the 2nd respondent. On terms of service at clause 6 the letter stated, "You will be employed on contract terms of service commencing from December 1, 2020. This contract appointment will be for a period of five (5) years or upon attaining the mandatory retirement age of sixty (60) years whichever is earlier. The Board reserves the right to terminate your services



prematurely depending on your performance and in accordance with the terms and conditions of employment as set out in the Labour laws and Human Resource Policy manual for WASREB.” The agreed gross monthly payment inclusive the allowances was Kshs 548, 660.00. If the contract was to run for 5 years, it would lapse on or about December 1, 2025. If it was to lapse at attainment of 60 years, the petitioner pleaded that he submitted on the date of employment his National Identification card showing his date of birth was on December 29, 1962 forming part of his records held by the 1st respondent. Thus the contract would alternatively end on or about December 29, 2022. By reason of the said clause 6 of the letter of appointment, the petitioner would retire on December 29, 2022. The petitioner’s case is that per Government Circular Ref No MSPS/HRM/2/2/2VOL II (21) dated May 29, 2012 and Regulation 70(1) (b) of the *Public Service Commission Regulations, 2020*, the petitioner will attain mandatory retirement age for public servants with disability at 65 years being on December 29, 2027. In view of that, he states that he has a legitimate expectation that he will retire on December 29, 2027 upon attaining the mandatory retirement age for persons with disabilities.

2. By letter dated February 15, 2022 Ref No WASREB/P F/2009004(7) the 1st and 2nd respondents notified the petitioner that he had attained the mandatory retirement age of 60 years and he was set to retire on December 29, 2022 and his last day at work was on December 28, 2022. The petitioner on November 28, 2022 met the 1st respondent’s Corporate Services Committee to review his terms of service on account that he was a person with physical challenges. He informed the Committee about his condition and close medical supervision since 2016 up until a medical report dated July 21, 2022 was issued by Aga Khan University Hospital. The report signed by Dr Otieno F O Consultant Physician and Rheumatologist concluded thus, “He (the petitioner) received 1 M steroid injection, bilateral knee injection and started on medication for rheumatoid arthritis and gout. He is advised to start physiotherapy. Functionally Peter has progressive knee osteoarthritis with difficulty in locomotion. I will see him again in 1 month with knee X-ray to assess possibility of referral for surgical intervention.”
3. The petitioner pleads that he also informed the committee that the Ministry of Health through Thika Level 5 Hospital did an assessment for physical disability and has since issued him with an assessment form verified by the Director of Medical Services – Kiambu county confirming that the status of his physical incapability is permanent. On December 9, 2022 the National Council for Persons with Disabilities confirming that the petitioner is a registered person with the Council as “Ref No NCPWD/P/582319.Peter Mwangi Njaggah”
4. On December 9, 2022 the petitioner wrote requesting the 1st respondent to review his contract terms stating that per clause 6 of the letter of appointment he would attain 60 years of age on December 29, 2022 and he requested the 1st respondent thus:
 - a) That on the basis of the medical records and after registration under the *Persons with Disabilities Act* No 14 of 2013, his employment records be amended to reflect the mandatory age of 65 years.
 - b) That based on the Government policy and judicial recognition he continues to serve and complete the remaining part of his contract with the 1st respondent.
5. The petitioner’s case is that the 1st and 2nd respondents have completely ignored his request and the said supporting documents on his status as a person with disability – a whimsical, capricious conduct with impunity. The petitioner filed the petition for protection of his contract of service which is being terminated on December 29, 2022 being 5 years prior to attaining 65 mandatory retirement



age for persons with disabilities per section 80 (1) (a) of the [Public Service Commission Act](#) as read with Regulation 70(1) (b) of the [Public Service Commission Regulations, 2020](#). The section states that an employee shall retire from the service with effect from the date of attaining the mandatory retirement age. The regulation provides that the mandatory retirement age for persons with disability shall be upon attainment of 65 years of age. The petitioner states that same offends section 3 of the [Employment Act](#) and Article 41 of the [Constitution](#) on fair labour practices. The actions are pleaded to be unprocedural, arbitrary, illegal and unlawful. Further, it offends his constitutional right to identity, right to human dignity, right to fair labour practices, right to property as well as right to fair hearing among other rights and freedoms. Unless stopped by order of Court, the petitioner states that, the 1st and 2nd respondents will proceed to terminate his contract of service effective December 29, 2022 instead of on December 1, 2025 per clause 6 or on December 29, 2027 upon attaining the age of 65 years prescribed for persons with disabilities.

6. The 1st and 2nd respondent appointed Kipkenda & Company Advocates to act in the petition. They filed on February 9, 2023 the replying affidavit of Dr Julius Itunga , 1st respondent's Acting Chief Executive Officer and sworn on February 8, 2023. it was stated and urged as follows.
7. The 1st respondent is a regulatory state corporation established under section 70(1) of the [Water Act, 2016](#). Its main objective is to protect the interests and rights of customers in the provision of water services while ensuring other stakeholders interests are also safeguarded. It sets standards and enforces regulations that guide the water sector in ensuring that consumers are protected and have access to efficient, affordable and sustainable services.
8. It is admitted that the 1st respondent employed the petitioner as pleaded in the petition. The terms of service in clause 6 were that the employment commenced December 1, 2022 for 5 years or upon attainment of mandatory retirement age of 60 years. The petitioner provided his identification card at employment and it is admitted that it showed his date of birth as December 29, 1962 so that he would attain 60 years of age on December 29, 2022. Thus per clause 6 of letter of appointment, the petitioner was informed by the letter dated February 15, 2022 that he was scheduled to retire on December 29, 2022 upon attaining mandatory retirement age of 60 years. On November 28, 2022 the petitioner proceeded on terminal leave and it was at that time that he initiated the process of acquiring registration status as a person living with disability. As at recruitment in 2020 and throughout the service the petitioner never disclosed to the respondent that he was a person living with a disability.
9. Prior to proceeding on terminal leave on November 28, 2022, the petitioner wrote to the 1st respondent the letter dated October 12, 2022 seeking an extension of his contract. That material fact he failed to disclose in his petition and supporting affidavit. The letter made no reference to the petitioner's disability status. The letter was issued by the petitioner on October 12, 2022 being after 8 months from February 15, 2022, the date of the retirement notice.
10. Further, the first time the petitioner raised the issue of disability was on November 28, 2022 when he met the Corporate Affairs Committee of the Board and as per his own pleading. On December 9, 2022 he wrote conveying that he had acquired the Council's registration certificate on the same December 9, 2022 and requested for review of clause 6 by inserting 65 years in place of 60 years. The medical report was dated July 21, 2022 being 5 months from the date of the retirement notice but, the petitioner opted not to bring it to the attention of the 1st respondent.
11. It is the 1st and 2nd respondent's case that the petitioner hurriedly obtained the certificate of registration as a person with disability while on terminal leave so as to forestall his imminent retirement. He had proceeded on terminal leave on November 28, 2022. He was due to retire on December 29, 2022 upon attainment of mandatory retirement age of 60 years and per contractual clause 6. On November 29,



- 2022, a day after commencement of the leave, he completed assessment form for physical disability. Ten days later he undertook the assessment and medical examination. Less than 10 days later his application was verified on December 8, 2022. He presented the report to the National Council of Persons with Disabilities and on December 9, 2022 he secured registration as a person with disability. Thus, the 1st and 2nd respondents urge that the petitioner's actions were purely an afterthought. In his service, he had not sought and obtained tax exemption from the Kenya Revenue Authority per section 35(1) of the *Person with Disability Act*. It is admitted that the *Public Service Commission Regulations* prescribe mandatory retirement age is 60 years and 65 years for persons with disability. The Commission is entitled to subject an officer to a second medical opinion about a disability status and the petitioner's hurried registration was designed to defeat the second opinion. If indeed the petitioner had disability status since 2016, he took no steps to disclose the same at the contractual time or through his service. The letter of appointment was signed on November 4, 2020 for a term of 5 years or upon attaining the mandatory retirement age of 60 years per clause 6 thereof. The Court cannot rewrite the contract at all.
12. It is therefore urged for the 1st and 2nd respondents that the issuance of the retirement notice dated February 15, 2022 and termination of employment contract on December 28, 2022, on account of mandatory retirement age of 60 years, was lawful per the written contract of service and the *Public Service Commission Regulations*. Further, the Court should uphold the same.
 13. The petitioner filed the supplementary affidavit on March 6, 2023. it was urged that the replying affidavit was without authority because the gazette notice No 1138 of February 1, 2023 had revoked appointments of the members of the 1st respondent's Board. Further, on November 28, 2022 the petitioner met the Corporate Affairs Committee about review of clause 6 of terms of service and explained his medical supervision since the year 2016 until July 21, 2022 when the doctor issued the report. On June 30, 2022 a consulting physician and nephrology referred the petitioner to Mbagathi County Hospital for disability evaluation noting that the petitioner had bilateral knee arthritis for 10 years – so that the disclosure of disability was not on account of the retirement notice or an afterthought. Further at all material time the petitioner states that he was not on terminal leave and on December 6, 2022 and on December 7, 2022 he had actioned two purchase requisition of materials to the 1st respondent per exhibited documents showing he was on duty and at all material time was not on terminal leave. Further, upon registration with the Council on December 9, 2022, the petitioner applied for income tax exemption on December 16, 2022 per exhibited requisite form. He received on January 11, 2023 a notification inviting him to go to the Council on February 8, 2023 for tax exemption vetting. That shows compliance with section 35(1) of the *Persons with Disability Act, 2023* by his application of December 16, 2022. He is duly registered and the Commission can seek a second opinion only if there exist doubt and which is not the case in the instant case. He followed all lawful channels to get registered.
 14. The 3rd respondent was served but failed to participate in the proceedings and filed no replying affidavit or submissions.
 15. The court has considered all the material on record and the parties' respective submissions. The Court returns as follows.
 16. To answer the 1st issue for determination, the Court returns that the parties have mutually agreed that they signed the contract of service being the letter of appointment dated November 4, 2020. The petitioner signed the letter in acceptance on November 5, 2020. It is no said that there was any mistake about the mandatory retirement age of the petitioner being attainment of 60 years of age. There is no established reason to vitiate the binding effect of the contract. The Court returns that as submitted for



- the 1st and 2nd respondent, the contract was good and binding so that the Court will not rewrite it. The parties were in contract of service whose tenure was properly governed by clause 6 thereof.
17. To answer the 2nd issue, the Court returns that while the petitioner was registered as a person with disability on December 9, 2022, clause 6 referred to mandatory retirement age of 60 years. The petitioner received the retirement notice and does not deny that he wrote the letter dated October 12, 2022 requesting for extension of service beyond the age of 60 years. By that letter it is clear that as urged for the 1st and 2nd respondents, the petitioner understood the scope and import of clause 6 and that by agreement the contract would lapse upon his attaining the mandatory retirement age of 60 years.
18. To answer the 3rd issue, the Court returns that even where a person is with disability, nothing stops such a person from concluding a fixed term contract with an employer in public service. The Court considers that where such contract is concluded like in the instant case, the clear contractual terms must be binding and it cannot be that the court reads into the clear terms and impose a tenure of retirement at 65 years of age for an employee with a disability. The proper principle is one of integration so that a person with disability is accorded as equal chance to freely enter contract upon such terms as are negotiated and therefore binding upon both parties to the contract. In the instant case the parties agreed upon a tenure of 5 years or attainment of mandatory retirement age of 60 years and which parties agreed was not mistaken because as at signing of the letter of appointment, the petitioner's mandatory retirement age was 60 years per prevailing *Public Service Regulations* cited by the petitioner. As submitted for the 1st and 2nd respondent, Regulation 70 (2) (b) states that a public officer shall be considered for retirement as a person with disability if the officer, *inter alia*, 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 the Public Service 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". As submitted for the 1st and 2nd respondents, even if the Court were to read into clause 6 of the letter of appointment to 65 years as urged for the petitioner, it is apparent that the petitioner as at December 29, 2022 (the due date of retirement upon attaining 60 years) he had not satisfied the preconditions for a public officer to qualify for mandatory retirement at the age of 60 years – namely having a Kenya Revenue Authority tax exemption on account of disability status after registration by the Council, and, having been entered in the 1st respondent's database as a person with disability for at least three years before the date of retirement, December 29, 2022. The Court therefore returns that there is no established reason to fault the 1st respondent's issuance of the retirement notice and reluctance to read age of 65 years in favour of the petitioner as the mandatory retirement age for purposes of clause 6 thereof.
19. To answer the 4th issue, the Court returns that Dr Julius Itungu had authority to swear the replying affidavit. It is submitted for the petitioner that at the time he made the affidavit, the appointment of the 1st respondent's board members had been revoked. The Court finds that such revocation of the appointment of the Board members did not take away or along the already accrued express or implied authority of the acting Chief Executive Officer, Dr Julius Itungu to act on behalf of the 1st respondent as the responsible officer. Further the Chief Executive Officer had been sued as the 2nd respondent and in that acting capacity, the Court finds that he had authority to swear in that behalf as a party to the petition free from the 1st respondent's authority. Finally, at paragraph 44 it is stated, "44. That the facts deposed herein are true to the best of my knowledge, information and belief, save for information whose sources whereof I have clearly disclosed" That position has not been attacked by the petitioner and as a witness by way of affidavit evidence, the competence of Dr Julius Itungu has not been attacked at all in material respects. The objection to the replying affidavit will therefore collapse.



20. To answer the 5th issue the Court returns that the petitioner has not established a basis for the award of the reliefs as prayed for. In particular, and as submitted for the 1st and 2nd respondents, the petitioner has failed to show the alleged contravention of rights and freedoms as was alleged. The retirement notice dated on February 15, 2022 has been found to have been properly based upon clause 6 of the letter of appointment and it was not illegal as alleged. It has not been shown that the 1st and 2nd respondent had in any material respect interfered with the terms and conditions of service in the letter of appointment dated November 4, 2020. There is no established basis to rewrite or read into clause 6 of the letter of appointment that the mandatory retirement age for that purpose is 65 and not 60 years as was agreed and signed between the parties.
21. The Court has considered the circumstances of the case including the petitioner's otherwise established health status and each party to bear own costs of the petition.

In conclusion judgment is hereby entered for the 1st and 2nd respondent against the petitioner for dismissal of the petition with orders each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25TH MAY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

