



**Fwamba v Moi Teaching and Referral Hospital; National Council for  
Persons with Disabilities (Interested Party) (Petition E003 of 2023)  
[2023] KEELRC 3109 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3109 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION E003 OF 2023  
MA ONYANGO, J  
NOVEMBER 24, 2023**

**BETWEEN**

**MARGARET NALIKA FWAMBA ..... PETITIONER**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL ..... RESPONDENT**

**AND**

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES .... INTERESTED  
PARTY**

**JUDGMENT**

**The Petition**

1. Margaret Naliaka Fwamba the Petitioner herein filed the instant Petition on 28<sup>th</sup> June 2023 against the Respondent. The Petitioner has invoked various Articles of *the Constitution* seeking the following reliefs;
  - a. A declaration be and is hereby issued that the Respondent's acts/omissions complained are in violation of Petitioner's constitutional rights and fundamental freedoms set out in articles 27(1)(4), 41(1), 47, 54(1)(a) of *the Constitution* of Kenya and Article 7 of the Universal Declaration of Human Rights
  - b. A declaration be and is hereby issued that the Respondent's acts of issuing letters of retiring the petitioner is unconstitutional, unlawful, null and void to the extent that it purports to deny the Petitioner the privilege of continuing to work in Public Service until she attains age 65 years, the mandatory retirement age for persons with disabilities



- c. An order calling into this court for purposes of quashing any letter that may have been issued by the Respondent to the effect that the Petitioner is due for retirement upon attaining the age of 60 years and in the alternative, a declaration that the letters so far issued for the retirement of the Petitioner at 60 years are of no legal effect.
  - d. A mandatory injunction be and is hereby issued directed at the Respondent to forthwith process, approve and do all things necessary to the retirement age for persons with Disability.
  - e. A permanent prohibitory injunction be and is hereby issued restraining the Respondent its agents and/or employees jointly and severally from denying the Petitioner the privilege to continue working in public service as a person with disability whose mandatory retirement age is 65 years
  - f. An order be and is hereby issued directed at the Respondent to forthwith pay the Petitioner any or all salaries, benefits and/or emoluments due but not remitted on account of the unlawful withholding of the same
  - g. An Order be and is hereby issued directed at the Respondent to compensate the petitioner for the infringement of the Petitioner's constitutional right and fundamental freedoms not to be discriminated upon on account of disability, right to fair administrative action and rights to fair labour practices and the right to equal protection and benefit of the law.
  - h. The costs of this petition be borne by the Respondent
2. The basis of the Petition is that vide letters dated 9<sup>th</sup> May 2023 and 10<sup>th</sup> June 2022 the Respondent intimated and indeed informed the Petitioner that upon her attaining the age of 60 years, the Petitioner should proceed on leave and thereafter, proceed on retirement.
  3. The Petitioner avers that the notice was issued on misinformed grounds driven by sheer malice and utter disobedience of the law and discriminated on the Petitioner's rights as a person living with disability.
  4. It is contended by the Petitioner that while working in the year 2005, she got injured and was subsequently put under several surgeries which made her unable to work without a walking aid and that the respondent facilitated the said surgeries through its medical schemes which means the respondent was well aware of the petitioner's condition.
  5. It is further averred by the petitioner that pursuant to the said operations and the resultant disability, she petitioned the Respondent's Disability Assessment Committee on 29<sup>th</sup> January, 2019 for a consideration that she be declared a person living with disability to no avail
  6. It is the Petitioner's case that on 28<sup>th</sup> January 2020, the Respondent's Chief Executive Officer referred the Petitioner to the Director General -Health which recommended that she is a person living with disability and that through an advert she was assessed at Uasin Gishu County Hospital where she was recommended for registration as a Person Living With Disability.
  7. The Petitioner further states that upon registration as a Person Living With Disability, it was prudent for the Respondent to acknowledge her as such and accord her all the services that Persons Living With Disability enjoy.
  8. The Petitioner states that the Respondent wrote a letter to the Executive Director of the Interested Party on 23<sup>rd</sup> February 2022 of its intention to send the Petitioner on retirement which letter, the



Interested Party responded to vide a letter dated 14<sup>th</sup> October 2022 of the need to extend the Petitioner's retirement age to 65.

9. It is averred that the Respondent upon receipt of the letter dated 14<sup>th</sup> October 2022 remained adamant and proceeded to issue the letters complained of in this Petition.
10. It is therefore the Petitioner's case that the Respondent's actions are discriminatory in nature and raises issues pertaining to the discrimination of Persons Living With Disability by the violation of their Constitutional rights enshrined in Articles 10, 27(8), 38, 54, 81(b) and 177(1)(c) of *the Constitution* of Kenya.

### **The Respondent's case**

11. The Respondent opposed the Petition vide a Replying Affidavit sworn on 14<sup>th</sup> August 2023 by Paul Mulwou, its Senior Human Resource Officer.
12. In that affidavit, it is averred that the Respondent has no alternative but to conform to Regulation 70 of the Public Service Commission Regulation 2020 which regulation is a conjunctive requirement and all three parts of the test must be complied with in order for a Person With Disability to benefit from it.
13. The Respondent maintains that under the said regulations, an employer and in this case the Respondent cannot extend the retirement age of a person outside the strict confines of the law and that even in the unlikely event that this court deems it fit to grant the Petitioner the orders, the Respondent is incapable of implementing the same as such action will blatantly creep into the very mandate of Public Service Commission as this court does not have the requisite tools to expand the retirement age of the petitioner as is being alluded to.
14. It is further contended that the orders for compensation on an alleged infringement of the Petitioner's Constitutional right and fundamental freedoms cannot issue as the Respondent is acting within the provisions and dictates of the law and that the petition and the orders sought are far-fetched, inaccurate and outside the powers possibly vested upon the Respondent.
15. It is the Respondent's case that it issued the Petitioner with a retirement notice on 10<sup>th</sup> June 2022, one year prior to her retirement and that upon receipt of the notice of retirement, the Petitioner proceeded to submit her disability documentation for uploading into the Respondent's Human Resource Database on 28<sup>th</sup> September 2022, three months later.
16. The Respondent states that it was served with a letter from the Interested Party on 14<sup>th</sup> October 2022 requesting for extension of the Petitioner's retirement age to 65 years in accordance with Public Service Commission Regulations, 2020.
17. According to the Respondent, as per the regulations the Petitioner had not met the laid-out requirements of having 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.
18. The Respondent maintains that it replied to the Interested Party's request for extension of retirement age of the Petitioner and informed it unequivocally that it was not in line with Regulation 70(2)(b)
19. It is further maintained that the Petitioner has admitted that she had ample time to register with the Respondent's Human Resource Database as a Person With Disability but did not do so until 28<sup>th</sup> September 2022 approximately three months after receipt of the retirement notice.
20. The court was urged to dismiss the Petition.



### **Petitioners Re-joinder**

21. The petitioner filed a further affidavit sworn on 13<sup>th</sup> July 2023 in response to the Respondent's Replying Affidavit and reiterated the contents of her supporting affidavit dated 29<sup>th</sup> June 2023.
22. The petition was disposed of by way of written submissions.

### **Petitioner's submissions**

23. The Petitioner in her written submissions filed on 28<sup>th</sup> September 2023 framed the following three issues which she asked the court to determine;
  - i. Whether the Respondent breached the Petitioner's right to retire at age 65
  - ii. What is the effective date of regulation 70 of the Public Service Commission Regulation, 2020 and whether it is applicable to the Petitioner
  - iii. Whether the Applicant is entitled to an injunction
24. On the first and second issues, the Petitioner submitted that the cause of action was actuated by the Respondent's letter of intention to retire the Petitioner with effect from 2<sup>nd</sup> July 2023 in accordance with sections 13.7.1 of the MTRH Human Resource Policy and Procedures Manual, August 2018 and section D.21 of the Human Resource Policies and Procedural Manual for the Public Service of May 2016.
25. It is submitted that the Petitioner appealed the decision by the Respondent to retire her upon attaining the age of 60 years instead of 65 years on grounds that she is a Person With Disability and duly registered by the Council as at 19<sup>th</sup> December 2019.
26. According to the Petitioner, section 70(2)(b) of the Public Service Commission Regulations 2020 and the Respondent cannot in law apply the aforesaid regulation retroactively since that would violate the *Statutory Instruments Act* no. 23 of 2013.
27. It is the Petitioner's case that the impugned Public Service Commission Regulations 2020 came into effect on January 2020 and therefore cannot apply retroactively to the Petitioner who suffered permanent disability in the year 2005 and was registered as a person with Disability on 19<sup>th</sup> December 2019. That there was no policy document at the time that required her to register with the Council at least three years before the date of her attaining 60 years of age. It is therefore the Petitioner's submission that such retroactive application is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom like Kenya. That the same violates Article 24(1) of *the Constitution* which only allows limitation of certain rights and fundamental freedoms based on the above criteria. To buttress this position, the Petitioner relied on the decision in *Petition No. 74 of 205, Margaret Martha Byama Vs Alice Otwala, the Public Service commission and two others (2016) eKLR*.
28. According to the Petitioner, the issue of retirement is to be guided by the Public Service Commission circular dated 29<sup>th</sup> May 2012 which did not provide the onerous and apparently unreasonable conditions which the Respondent seeks to visit unlawfully on the Petitioner.
29. With respect to the third issue on whether the Petitioner is entitled to an order of injunction, it is the Petitioner's submission that she has met the requirements for grant of the orders sought. The Petitioner submits that she has a prima facie case with probability of success and that she stands to suffer irreparable loss.



30. It was submitted for the Petitioner that she had shown through her various annexures that she has been in constant communication with the Respondent concerning her disability.
31. It is also submitted that the Petitioner had a legitimate expectation that her retirement age would be extended by the Respondent having sustained the injury leading to her disability while in the cause of her duty. That she cannot be adequately compensated by an award of damages and hence the dire need for the grant of orders as prayed in the Petition.
32. The Petitioner further submits that on a balance of convenience, the Court ought to maintain the lower risk by preventing the Respondent from retiring the Petitioner at the age of 60 years. The Court was urged to consider the steps taken by the Petitioner in an attempt to have the Respondent recognize her as a Person With Disability. Reliance was placed in the case of *Films Rover International v Cannon Films Sales Limited* (1986)3 ALLER 772
33. It is the Petitioner's submission that the Petition is merited and should be allowed with costs as the balance of convenience tilts in the Petitioner's favour.

### **Respondent's submissions**

34. The Respondent filed its submissions on 18<sup>th</sup> September 2023. The issues for determination were framed as:
  - i. Whether the Respondent has the mandate to extend the retirement age of the Petitioner as alleged in the Petition
  - ii. Whether the Petition meets the requisite Constitutional Petition requirements
  - iii. Whether the Petitioner is eligible for the orders/relief sought
  - iv. Who should bear the costs of this petition.
35. On the first issue, the Respondent submits that the Petitioner submitted her registration card as PWD together with the tax exemption certificate to the Respondent on 28<sup>th</sup> September 2022 barely a year before her retirement thus not meeting the express and compulsory provisions of Regulation 70(2) on the 3 year mandatory period.
36. It is the Respondent's submission that what the Petitioner seeks this court to compel the Respondent to do is outside the precincts of the law, and will result in an illegality on both the part of the court and the Respondent.
37. It is further submitted that the retirement at the age of 65 years is not automatic and a public officer ought to comply with the requirements of regulation 70 of Public Service Commission regulations. To support this position, the Respondent relied on the decision in *Justice Kalpana H. Rawal v Judicial Service Commission & 3 others* (2016) eKLR and *Aminga vs Cabinet Secretary Ministry of Education, Science and Technology & 2 others* (Petition E020 of 2020) (2023) KEELRC 32 (KLR).
38. The Respondent faulted the Petitioner's delay in submitting the relevant documents and maintained that she has not demonstrated why she waited to register with the Respondent's database after being served with a retirement notice. It was contended that whereas the Petitioner is duly registered by the National Council for Persons With Disabilities, she did not comply with the requirement under Regulation 70(2)(b) of Public Service Commission Regulations.
39. On the issue whether the Petition meets the requisite Constitutional petition requirements, it is the Respondent's submission that the Petitioner has misguidedly elected to ventilate her issues through a



constitutional petition despite there being other mechanisms. It is the Respondent's position that the Petitioner has not exhausted the mechanisms in place to deal with the issues raised.

40. On the issue whether the Petitioner is entitled to the reliefs sought, the Respondent submits that the Petitioner has failed to prove the alleged violation of her constitutional rights. It is the Respondent's submission that on its part, it has provided proof that it conducted itself within the bounds of Regulation 70 of the Public Service Commission Regulations.
41. The Respondent submits that the Petition is vexatious, frivolous and an abuse of the court's process as the Petitioner had ample time to register with the Respondent's Human Resource Database but only did it at the eleventh hour.
42. It is thus submitted that the Petition should fail and costs be borne by the Petitioner.

### **Determination**

43. From the Petition, the responses thereto and the submissions on record, the issues that fall for determination are:
  - i. Whether the Respondent breached the Petitioner's statutory right to retire at Age 65 years as a Person With Disability?
  - ii. What orders should issue.
44. Section 80 of the *Public Service Commission Act* provides for retirement on the basis of age for public officers as follows:
  1. Where a public officer has attained the mandatory retirement age as may be prescribed in regulations—
    - a. the public officer shall retire from the service with effect from the date of attaining the mandatory retirement age; and
    - b. the Commission or other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age.
  2. Despite subsection (1)(b), the Commission or other appointing authority may engage the public officer for service after the retirement upon such terms of contract as may be agreed if—
    - a. the public officer possesses rare knowledge, skills and competencies for the time being required in the service;
    - b. the retired officer is willing to be engaged on contract; and
    - c. the retired public officer's performance shall not in any way be impaired by age.
45. Regulation 70 of the Public Service Commission Regulations, 2020 provides for retirement of persons with disability as follows: -
  70. Retirement on age grounds.
    - (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 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) ...
- (7) In this regulation—



- (a) ...
- (b) “disability” means a permanent physical or other impairment or condition that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day to day activities.

46. The Respondent’s Human Resource Policy and Procedures Manual provides at paragraph 13.7.1 for mandatory retirement age as follows:

Mandatory Retirement Age

The mandatory retirement age shall be sixty (60) years, however, persons living with disabilities will retire on attainment of sixty-five (65) years. The mandatory retirement age shall be guided by prevailing government guidelines as may be issued from time to time.

47. Having set out the relevant legal framework the first issue for consideration is the Respondent’s assertion that this court has no mandate to grant the orders sought which in my view is absurd to say the least. For the avoidance of doubt, this court has the constitutional and statutory mandate to inquire into all terms and conditions of employment including statutory instruments relating to employment and to make appropriate orders and/or give appropriate reliefs where the orders are warranted. An order of the court cannot be a nullity and a person who comes before the court cannot come and pronounce that if the court grants certain orders it will not be able to comply because such orders are a nullity.
48. The Public Service Regulations rank lower than statutes and *the constitution*. They are statutory instruments. If the court finds them either unconstitutional or non-compliant with statute the court will not hesitate to declare so.
49. The next issue is the Petitioner’s arguments that applying the Regulations to the petitioner would be retroactive. As stated by the Petitioner, the Regulations were promulgated on 28<sup>th</sup> January 2020 and became effective on that date according to the *Statutory Instruments Act*. On the date of promulgation the Petitioner’s retirement age was more than 3 years away. To be exact, 3 years and 5 months away. Had she complied on the date of promulgation or soon thereafter she would have met the three year cut off date for registration in the Respondent’s database for persons with disability. However, in view of the fact that she had no Tax Exemption Certificate which she only applied for in 2022, she would not have been eligible for registration in the database at that time.
50. According to the Respondent, the Petitioner submitted her registration card as PWD together with the tax exemption certificate to the Respondent on 28<sup>th</sup> September 2022, less than a year to the date of her retirement and some 3 months after being issued with notice that she would be retiring on 2<sup>nd</sup> July 2023. It was thus the Respondent’s submission that the Petitioner did not meet the express and compulsory provisions of Regulation 70(2) which requires that the employee is registered in the human resource database as a person with disability for at least three years before the date of retirement.
51. The Petitioner on the other hand has submitted that the Public Service Commission Regulations 2020 came into effect on January 2020 and therefore cannot apply retroactively to the Petitioner who suffered permanent disability in the year 2005 and was registered as a person with Disability on 19<sup>th</sup> December 2019. According to the Petitioner, at the time she was registered as a person with disability



there was no policy that required her to be registered in the Respondent's human resource database as a person with disability for at least three years before the date of retirement.

52. In the case cited by the Petitioner in support of her case, Employment and Labour Relations Court Petition No. 74 of 2015, Margaret Martha Byama –vs- Alice Otwala, The Public Service Commission and Two others [2016} eKLR, the court held: -

“ 18. Disability is physical sensory, mental or other impairment which adversely affects the person concerned in his or her social, economic or environmental participation. It exists as a fact whether registered or not. Registration is simply to create a database for purposes of operationalizing the rights conferred by the persons with Disability Act and *the Constitution*. It does not confer those rights which automatically exist, once a person fits into the definition of disability contained in the Act.”

53. In the instant case the petitioner was registered as a PLWD on 17<sup>th</sup> December 2019. She claims that she obtained a tax exemption certificate from KRA but what she has attached is an acknowledgment of receipt of her application for exemption with a note at the bottom stating that “This is to acknowledge receipt of your application for Income Tax Exemption. This application shall be forwarded to Eldoret for further processing.”

54. The Respondent's Human Resource Policy and Procedures Manual is clear that the mandatory retirement age for its staff will be guided by prevailing government guidelines as may be issued from time to time.<sup>8</sup> In this case the government through the Public Service Commission issued guidelines which require that the employee must be 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.

55. The Petitioner herein does not qualify by virtue of the fact that she does not have the Tax Exemption Certificate which together with the Registration certificate from National Council for Persons With Disabilities are prerequisites for extension of mandatory retirement age from 60 to 65 years.

56. For the foregoing reasons I find no merit in the petition and accordingly dismiss the same. Each party shall bear its costs.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 24<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M. ONYANGO**

**JUDGE**

