



**Obiero v Moi Teaching and Referral Hospital (Petition E005 of 2023)  
[2023] KEELRC 3267 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3267 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION E005 OF 2023  
MA ONYANGO, J  
DECEMBER 7, 2023  
IN THE MATTER OF ARTICLES 22,38,54,81,87,90,176,177(1)  
(C) AND 197 OF THE CONSTITUTION**

**BETWEEN**

**FRANCIS JULIUS OMONDI OBIERO ..... PETITIONER**

**AND**

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

**JUDGMENT**

**The Petition**

1. Francis Julius Omondi Obiero the Petitioner herein is an employee of Moi Teaching and Referral Hospital (MTRH) the Respondent herein. He was employed by the Ministry of Health in January 1987 and Posted to MTRH which by then was a district hospital. MTRH was subsequently established as a state corporation under the [State Corporations Act](#).
2. Vide the instant Petition dated 14<sup>th</sup> July 2023 the Petitioner avers that at the age of 11 years he was hit by a stone in the right eye and sustained serious injury that would later cause blindness. He states that in the year 2017 he sought review of his condition by the Respondent's Disability Assessment Committee and was denied a hearing on grounds that his right eye could see partially.
3. The Petitioner avers that he sought treatment by an eye specialist within MTRH and by 2021 it became clear that his condition could not improve. That he was informed that his right eye was afflicted by a condition known as glaucoma amblyopia and could not be repaired.
4. The Petitioner states that by letter dated 4<sup>th</sup> October 2021 the Respondent through the Chief Executive Officer recommended that he be considered for registration as a person living with disability (PWD) and be considered for tax exemption. He states that he appeared before the Respondent's Disability Assessment Committee on 7<sup>th</sup> October, 2021 and a report was prepared informing the Ministry of



- Health of the Petitioner's disability and eligibility for registration as a PWD, a recommendation that was approved on 4<sup>th</sup> November, 2021.
5. The Petitioner was subsequently registered as PWD on by the National Council for Persons with Disability on 28<sup>th</sup> January 2022 under registration No. NCPWD/P/566974. He was thereafter issued with a tax exemption certificate dated 21<sup>st</sup> March 2022 by the Kenya Revenue Authority.
  6. The Petitioner avers that vide a letter dated 23<sup>rd</sup> March 2022, the Respondent, while granting tax exempt status to the Petitioner, informed the Petitioner that his retirement age would not be extended to 65 as provided for under the Public Service Regulations ostensibly on the ground that the Petitioner was not registered in the Respondent's database as a Person with Disability for at least three years before the date of retirement. That thereafter vide letter dated 19<sup>th</sup> September 2022, the Respondent served the Petitioner with a notice of retirement on grounds that he had attained the mandatory retirement age of 60 years. The Petitioner was required to take terminal leave effective 2<sup>nd</sup> September 2023 to 1<sup>st</sup> October 2023, and then proceed on retirement.
  7. Vide letter dated 21<sup>st</sup> September 2022, the Petitioner sought a review of the Respondent's decision communicated vide the above-mentioned letter laying out a case why he was entitled to an extension of his retirement age to 65 years rather than the 60 years that the Respondent was working with. The Petitioner avers that the Respondent ignored the said appeal, and has since given no reason for failure to respond to the application for review.
  8. It is the Petitioner's case that vide letter dated 14<sup>th</sup> December 2022, the National Council for Persons With Disabilities wrote and advised the Respondent that the Petitioner was entitled to an extension of his retirement age to 65 but the Respondent yet again ignored the advice.
  9. The Petitioner avers that the Respondent has denied him the right to fair administrative action and violated his rights under Article 47 and section 4 of the Fair Administrative Actions Act in that:
    - a. The Petitioner sought to be assessed for disability in the year 2017 but the Respondent, through the Chair of the Disability Assessment Committee declined to undertake the assessment on the ground that the Petitioner could see partially and advised treatment.
    - b. The Petitioner started treatment which was rendered by the Respondent from 2017 but by the year 2021, the Respondent, through its doctors, confirmed that the eye could not be treated. It is only then that a disability assessment was undertaken by the Respondent who recommended that the Petitioner be registered as a PWD.
    - c. Despite that recommendation, the Respondent, without hearing the Petitioner, declined to approve an extension of the Petitioner's retirement age to 65 and has in fact put the Petitioner up for retirement.
    - d. The Petitioner has appealed against that decision vide his letter dated 22<sup>nd</sup> September 2022 but the Respondent has disdainfully and without reason opted to ignore the Petitioner's appeal.
    - e. Equally, the Respondent has without reason chosen to ignore the advice rendered by the National Council for Persons With Disabilities rendered vide letter dated 14<sup>th</sup> December 2022 recommending extension of the Petitioner's retirement age.
    - f. The Respondent has deliberately failed to acknowledge the two foregoing appeals and deliberately refused to render a hearing on account thereof for no apparent reason contrary to the law on fair administrative action.



10. It is the Petitioner's case that by dint of Article 28 of the Constitution, he is entitled to human dignity and to have that dignity protected. That under the Convention on the Rights of People with Disabilities, ratified by Kenya on 19<sup>th</sup> May 2008, the Petitioner is entitled to inherent dignity as set out in Article 3(a) thereof. The Petitioner avers that his right to human dignity and to inherent dignity has been violated by the Respondent in the following manner:
  - a. The Petitioner is a PWD who is entitled to have his dignity respected, protected and promoted.
  - b. As a PWD, the Petitioner's ability to earn a living is at the core of his dignity as a human being.
  - c. By cutting short the Petitioner's legally permitted period of work, the Respondent has interfered with the Petitioner's capacity to earn a living in a manner inconsistent with his inherent dignity.
11. The Petitioner further avers that the Respondent is in violation of his right to fair labour practices and reasonable working conditions in that:
  - a. The Respondent frustrated and/or otherwise failed to facilitate the Petitioner's efforts to register as a PWD.
  - b. The Respondent has failed to grant the Petitioner fair treatment under the circumstances by ignoring appeals by both the Petitioner and the National Council for Persons With Disabilities regarding the issue of the Petitioner's retirement age.
  - c. By disregarding statutory, policy and institutional guidelines on the rights of the Petitioner as a PWD, the Respondent has made it difficult for the Petitioner to continue earning a living past 2<sup>nd</sup> October 2023, the date set by the Respondent for the Petitioner's retirement.
  - d. The Respondent served the Petitioner with a retirement notice one year prior to retirement creating conditions where the Petitioner works under anxiety and uncertainty.
  - e. To date, the Respondent has failed to enter the Petitioner into any PWD database, deliberately so.
12. The Petitioner further avers that the Respondent acted contrary to the protections accorded to him as a PWD under Article 54 of the Constitution as well under the Persons With Disabilities Act as read with Article 27 of the Convention on the Rights of Persons With Disabilities in that:
  - a. The Respondent is aware that the Petitioner is entitled to special protection as a PWD under the law,
  - b. By unreasonably denying the Petitioner the right to continue working past the age of 60, the Respondent has made a mockery of the affirmative action measures undertaken by the State to protect PWDs especially in the context of work.
  - c. By declining to enter the Petitioner into its database of PWDs, and for that reason declining to extend the Petitioner's retirement age to 65, the Respondent has violated the Petitioner's right to just and favourable conditions of work contrary to article 27 of the Convention on the Rights of Persons With Disabilities. Moreover, the Petitioner avers that the Respondent acted in bad faith in failing to facilitate the Petitioner's assessment for registration as a PWD when the Petitioner indicated his intention to undergo such an assessment as early as the year 2017.
13. Consequently, the Petitioner prays for the following reliefs:



- a. A declaration that the Respondent violated the Petitioner's right to fair administrative action by failing to respond to or grant a hearing to the appeals filed by or on behalf of the Petitioner challenging the decision to retire him at the age of 60.
- b. A declaration that the Petitioner having already been recognized as Person With Disability, he was entitled to extension of his retirement age to 65.
- c. A declaration that the Respondent acted illegally by refusing to extend the Petitioner's retirement age to 65 and that such refusal was a violation of the Petitioner's right as a person With Disability.
- d. A declaration that Regulation 70 of the *Public Service Regulations 2020* is unconstitutional to the extent that it facilitates violations of the rights guaranteed by the *Constitution*, the Convention on Persons With Disability as well as the *Persons With Disabilities Act*.
- e. An order that the Respondent is in violation of the Petitioner's right to fair labour practices and reasonable working conditions.
- f. An order quashing the notice of retirement dated 19<sup>th</sup> September 2022.
- g. An order that the Respondent bears the costs of these proceedings.

### **The Respondent's Case**

14. The Respondent opposed the Petition vide a Replying Affidavit sworn on 18<sup>th</sup> November, 2023 by Paul Mulwo, its Senior Human Resource Officer. The Respondent also filed undated submissions on 17<sup>th</sup> November, 2023.
15. It is the Respondent's Case that the knowingly and without just cause slept on his rights and failed to adhere to the statutory timelines in submitting his documents for registration as a person with disability. Mr. Mulwo deposed that the Respondent is obliged to conform to Regulation 70 of the *Public Service Commission Regulation 2020* which provides that extension of retirement age from 60 to 65 years is not automatic but is predicated upon meeting the requirements of the regulation.
16. It is the Respondent's submission that although the Petitioner alleges that that he has lived with the disability since childhood has not produced evidence of registration as a person with disability prior to 2021. That the *Persons With Disability Act* came into force in 2003 when the Petitioner was working with the Respondent but he did not apply to be registered as provided under the *Act*.
17. It is further the Respondent's Case that the Petitioner did not disclose at the time of recruitment that he had a disability. That there is no record that submitted to the Respondent before 2021 when he was examined by the eye specialist, about the Petitioner's disability.
18. The Respondent relied on the decision in the case of *Kinyua Felix v Ministry of Education & 2 others* where the court held that the petitioner who alleged to have been disabled since birth but did not disclose this fact at the time of recruitment did not fit the definition of disability for purposes of extension of retirement age based on the definition of disability in the *Persons With Disability Act*.
19. It is submitted that the Petitioner did not tender any evidence of discrimination. That the Petitioner's evidence of frustration by the Respondent in 2017 when he sought registration as a person living with disability was not supported by any evidence.



## Determination

20. 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.
21. 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.
22. 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.

23. 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.

24. In the instant case the Petitioner was registered as a PLWD on 28<sup>th</sup> January 2022. He was issued with a Tax Exemption Certificate by KRA dated 21<sup>st</sup> March 2022. The Respondent issued a notice of retirement to the Petitioner on 19<sup>th</sup> September, 2022 in accordance with section 13.7.1 of [Public Service Human Resource Policy and Procedures Manual](#). His appeal for review against the notice of retirement dated 14<sup>th</sup> December 2022 was not responded to.

25. According to the Petitioner, he was injured at age 11. As submitted by the Respondent, at the time of recruitment, the Petitioner did not disclose his disability status to the Respondent. According to the evidence on record, the first time the Petitioner expressed the desire to be registered as a PWD was in 2021 when he submitted a letter dated 4<sup>th</sup> October 2021 from Dr. Kennedy M. Wabwile in which it is



indicated that he had severe visual impairment in the left eye at the last paragraph thereof. However, at paragraphs 1 and 2 of the said letter it is stated that it is the right eye that had impaired vision. The medical report attached to the letter indicates that the Petitioner had impairment in the left eye. The report states that the Petitioner does not require any assistive device or mobility aid.

26. Regulation 70 defines disability as

“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.

27. The Petitioner did not explain how his disability affects his ability to carry out ordinary day to day activities.

28. The definition in the *Constitution* is also the same as that in the *Regulations*. The *Constitution* defines disability as:

“disability” includes any physical, sensory, mental, psychological or other impairment, condition or illness 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;

29. The *Employment Act* defines disability to mean

“disability” means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on a person’s social and economic participation;”

30. The fact that a person is registered as a person with disability alone does not entitle such a person to be automatically granted the benefit of extension of retirement age to 65 years. The Petitioner must prove

“substantial or long-term impact on the individual’s ability to carry out ordinary day to day activities of life.”

This is recognised in Regulation 70 which makes the proviso that:

“Provided that registration by the Council or possession of a tax exemption certificate shall not be considered as automatic evidence of disability.”

31. The foregoing is besides the fact that the Petitioner did not apply to be registered in the Respondent’s data base for persons with disability at least 3 years to the date of normal retirement as required by the rules.

32. I must add here that in my view partial or even total impairment of sight in one eye does not make one qualified for registration as a person with disability. The reasons persons are registered as PWD is to assist those who have genuine need due to the impact of disability in their lives socially and/or economically such as the necessity of an assistant, some expensive medication, some assistive device which costs them money hence the need for tax exemption. A person who suffers from a disability that does not impact on their social or economic lives is not qualified for registration as a person with disability as is evident from the definition thereof.



33. I find no merit in the petition herein and have no hesitation in dismissing it with costs. This should serve as a warning to persons who want to benefit from the kitty of persons with disability when they obviously do not deserve the same.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 7<sup>TH</sup> DAY OF DECEMBER, 2023.**

**M. ONYANGO**

**JUDGE**

