



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. E089 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 19, 20, 22 (1), 23, 43 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 22 (1), 23, 43 AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

ABDINOOR SHEIKH TAKOY

PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY

RESPONDENT

JUDGMENT

1. The Petitioner is an employee of the Respondent, having been engaged as a Deputy Director, Roads, Grade 3, following advertisement and competitive selection. He was deployed to the Respondent's Upper Eastern Region.
2. The Respondent is a statutory body established under the Kenya Roads Act, 2007 with the responsibility to develop, maintain, rehabilitate and manage National Trunk Roads within the Republic of Kenya.
3. It is the Petitioner's averment that by letter dated 22nd May 2020 the Respondent informed the Petitioner that he had allegedly attained the retirement age of 60 years and was due to retire on 30th June 2021. This communication was later reiterated vide a letter dated 29th May 2020, in which the Respondent required the Petitioner to retire by 30th June 2021.
4. The Petitioner states that in **Judicial Review No. 82 of 2019, Republic v Judicial Service Commission & 2 others ex parte Erastus Githinji**, this Court delivered a judgment on 28th June 2019 in which it held that in determining the retirement age of public servants, the employing authority should be guided by the date of birth appearing on the employee's certificate of birth rather than the national identity card. Thus, in the event of any discrepancy between the two identification documents, the entries in the certificate of birth should prevail.
5. That by circular dated 19th November 2020, the Public Service Commission informed all parastatals, including the Respondent, of the judgment in **Judicial Review No. 82 of 2019 (supra)** whose tenor was that the retirement age of public servants is pegged on the date on the certificate of birth, rather than the Identity card. Despite having knowledge of the said judgment and circulars, the Respondent was insistent on sending the Petitioner on an irregular early retirement.
6. By a letter dated 2nd July 2020, the Petitioner informed the Respondent that the documents in the possession of the Respondent indicating the Petitioner's year of birth as 1961 was wrong and that the Petitioner's year of birth was 1965 as indicated by both the Petitioner's certificate of birth and identity card.
7. The Petitioner avers that although his earlier Identity Card wrongfully indicated the Petitioner's year of birth as 1961, the Petitioner caused that error to be rectified. The Respondent's allegation that the Petitioner is in possession of two identity cards is incorrect as the petitioner corrected the confusion vide a legal process involving the Director of Civil Registration Services.
8. By a letter dated 19th December 2019, the Director of Civil Registration Services, verified that the Petitioner's certificate of birth serial number 599883 which indicates the Petitioner's date of birth as 28th November 1965 was correct. The Petitioner furnished the Respondent

with the said letter.

9. By a letter dated 4th June 2021, the Petitioner explained to the Respondent that the difference between the age of birth of 1961 and 1965 was due to government's legal procedure. That this fact is buttressed both by the letter from the Director of Civil Registration Services and the fact that the Petitioner took out his certificate of birth in 1999, while the identity card was issued in 2020. The letter of the Director of Civil Registration Services clearly irons out the discrepancies, if any.

10. The Petitioner states that his date of birth is 28th November 1965 and it follows that his retirement falls in 2025, four years from the date he was required to retire by the Respondent. The Petitioner avers that he has a legitimate expectation that he would only retire upon attaining the rightful age as prescribed in law. That the decision of the Respondent to send the Petitioner on an early retirement is wrong and irregular.

11. The Petitioner avers that the decision of the Respondent basing the retirement age of the Petitioner on the identity card rather than his certificate of birth is wrongful, unlawful, illegal and irregular and defiant of the judgment and directives in Judicial Review No. 8 of 2019 (supra), which decision is binding upon the Respondent. The Petitioner avers that the Respondent's decision declaring that the Petitioner's retirement is due on 30th June 2021 was wrongful, unlawful and irregular.

12. It is the Petitioner's further averment that by refusing to consider the Petitioner's Certificate of birth the Respondent has acted unreasonably and in violation of the decision of this Court, a breach of the Petitioner's legitimate expectation, is irrational, unfair and illegitimate.

13. The Petitioner avers that the decision to retire him early violates his right and the rights of his family to enjoy the basic fundamental rights that are guaranteed under the Constitution including the right to life, social and economic rights and the right to fair administrative action.

14. The petitioner seeks the following reliefs from the Court in is dated 10th June 2021 –

(a) A DECLARATION that the decision of the Respondent retiring the Petitioner by 30th June 2021 is unconstitutional, wrongful, irregular and illegal.

(b) AN ORDER FOR CERTIORARI quashing the Respondent's decision to retire the Petitioner from employment as communicated in the letter dated 22nd May 2021.

(c) AN ORDER FOR MANDAMUS compelling the Respondent to give effect to the Petitioner's Certificate of Birth of serial Number 599883 dated 9th November 1999 certifying that the Petitioner was born on 28th November 1965 as far as his retirement age is concerned.

(d) AN ORDER FOR PROHIBITION barring the Respondent from implementing the decision contained in the letter dated 22nd May 2020 retiring the Petitioner on 30th June 2021, until the Petitioner attains the rightful retirement age.

(e) Costs of this Petition.

(f) Interest on (e) above.

15. The Respondent filed a replying affidavit of ELIPHAS CHOGE, its Deputy Director, Human Resource Management sworn on 24th September 2021.

16. Mr. Choge deposes that the Petitioner indicated in his application for employment form that his date of birth is 1961. That the Petitioner further presented his identity card no. 113064 issued on 31st March 1979 which confirmed his date of birth to be 1961.

17. The affidavit further deposes that on 11th August 1986 the Petitioner applied for registration with National Social Security Fund (NSSF) where his records clearly indicated that his date of birth is 1961.

18. Mr. Choge states that it is within his personal knowledge that during the Petitioner's assessment for secondment interview held in 2010, the Petitioner indicated that he was aged 49 years, a testimony that proves that he was indeed borne in 1961.

19. It is further the averment of Mr. Choge that throughout his employment history the Petitioner did not make any request for change of personal particular nor submitted any contrary position with regard to details held in the Respondent's records until the date of his retirement.

20. Mr. Choge avers that the date of birth the Petitioner voluntarily declared on his first appointment was indeed maintained without variations until the Petitioner received the letter notifying him of his date of retirement, when he first wrote to the Respondent contesting the date of birth and produced an identity card different from the one he proffered, and for the very first time presented a birth certificate.

21. Mr. Choge avers that the Respondent wrote to the Department of Civil Registration who responded that the late registration was based on the supporting documents produced by the person seeking registration.

22. The petition was disposed of by way of written submissions.

Determination

23. The issues for determination are

- (i) The date of birth of the Petitioner;
- (ii) Whether the Respondent violated the Petitioner's constitutional rights.

Date of birth of Petitioner

24. According to the Petitioner's application for employment form, the date of birth declared by the Petitioner at the time of employment is 1961. This is evident from annexure AST-1 of petition.

25. By letters dated 22nd May 2020 from Ministry of Transport, Infrastructure, Housing and Urban Development (State Department of Infrastructure) and another letter dated 29th May 2020 from Kenya National Highways Authority, the Respondent herein, the Petitioner was informed that according to records held in the two offices he would be attaining mandatory retirement age of 60 years on 30th June 2021 having been born in 1961. Both letters were to serve as notices of retirement and referred the Petitioner to R19 of the Code of Regulations (Revised 2006) which provide for such notification.

26. Upon receipt of the notices, the Petitioner wrote to the Respondent on 2nd July 2020 forwarding a copy of his birth certificate which indicated he was born on 28th November 1965 and an identity card which had the same date of birth.

27. Upon receiving the letter from the Petitioner, the Respondent wrote to the Ministry to verify the date of birth of the Petitioner and the response was that the Petitioner would be attaining 60 years on 30th June 2021.

28. In the Petitioner's letter dated 4th June 2021, he states that –

“I hereby confirm that I am in possession of an ID card No. 1130641, the only difference is change in my date of birth due to late registration of birth certificate through the legal government procedures. My date of birth as per my only birth certificate is 29th November 1965.”

29. The national identity card produced by the Petitioner at the time of employment, a copy of which was retained by the Respondent is issued in Mandera on 31st March 1979. It states the date of birth is 1961. It is number 1130641, the same number as the one produced by the Petitioner but which was issued in Westlands on 18th June 2020 and gives the date of birth as 28th November 1965.

30. It is clear from the Petitioner's letter dated 4th June 2021 that the only reason he gave for changing his date of birth in the latter national identity card was to conform with the birth certificate. It is further evident that the national identity card produced by the Petitioner was issued on 18th June 2020, after he had received notification of retirement.

31. The Petitioner relies on the Court decision in **Republic v Judicial Service Commission & 2 others Ex Parte Erastus Githinji, (supra)** where the Court held that the date of birth of the Ex Parte Applicant was as per birth certificate.

32. The Petitioner has further relied on a circular from the Chairman, public Service Commission which I reproduce below –

Ref. No: PSC/ADM/13(9)

19th November, 2020

All Authorized Officers

DETERMINATION OF DATE OF BIRTH FOR PUBLIC OFFICERS

Circular Ref. Nos. DPM 7/7/43A Vol.IV/(125) dated 15th November, 1982; DPM PA/5/7 Vol. LII/170 dated 25th September, 2008; and MDP/DPSM.2/3 dated 14th October, 2013 communicated the policy on determination of and/or amendment/variation of date of birth for public officers for purposes of determining the effective date of retirement from the Service. In the said circulars, it was reiterated that “the date of birth as voluntarily declared on first appointment shall be maintained without variation”.

While the above has been the practice in the public service, your attention is drawn to the judgement by the Employment and Labour Relations Court on 28th June, 2019 in Judicial Review Application No. 8 of 2019. The court declared the policies on date of birth contrary to the provisions of the Births and Deaths Registration Act and the Evidence Act, and thus null and void.

In view of the court decision, the Commission directs that the date of birth for a public officer is the date on his/her Certificate of Birth, pursuant to the provisions of the Births and Deaths Registration Act and the Evidence Act. This directive supersedes the

provisions of the various circulars that have been hitherto obtaining in the Service. In this regard due care and diligence should, be taken to ensure that when implementing this new provision, any misrepresentation of facts is detected and appropriate action taken in accordance with the law.

Kindly bring the contents of this circular to all officers under your jurisdiction for information and compliance.

SIGNED

STEPHEN K. KIROGO, CBS, FPRSK

CHAIRMAN”

33. In the judgment referred to above, the Court reviewed several circulars that had been issued by Directorate of Personnel Management Ref. No. DPM 7/7/43A Vol. IV/ (125) dated 15th November 1982 titled “DATE OF BIRTH” and another one dated 25th September 2008 Ref. No. DPM PA/5/7 VOL. LII/ (170) titled “AMENDMENT/VARIATION OF DATE OF BIRTH”. The relevant portion of the judgment reads as follows –

“The circular by the Directorate of Personnel Management Ref. No. DPM 7/7/43A Vol. IV/ (125) dated 15.11.1982 then under the Office of the President titled “DATE OF BIRTH” stated as follows:

“The policy with regard to determination of an officer’s age for purpose of retirement was set out in Establishment Circular No. 43 of 13th November, 1958 as varied by Treasury Circular No. 23 of 14th August, 1967.

On first appointment a candidate is required to declare his age and date of birth in the Application for Employment Form PSC 2. This information is given voluntarily without any duress and it is vouched as correct by the candidate. The record of age is important because Regulation 23 of the Pensions Regulations provides that any period of service while an officer is under the age of 18 years shall not be taken into account as pensionable service.

It has been noted that there has been a growing tendency on the part of officers to alter their dates of birth when they realize that they are approaching retirement age so that they can stay on longer in the service. They do this by obtaining Birth Certificates from the Registrar of Births and Deaths. In order to curb this undesirable tendency, it has been decided that with effect from the date of this Circular, the applications for late registration of births from civil servants shall be routed through their Permanent Secretaries/ Heads of Departments who will endorse each application to the effect that the date of birth indicated therein tallies with the officer’s declared age on first appointment as reflected in official personal records. The Registrar of Births and Deaths will not issue a Birth Certificate to a civil servant other than through this process. Any Birth Certificate obtained by an officer in future without complying with the new requirement will not be honoured for purpose of determination of age on retirement.

With regard to Birth Certificates issued before the date of this Circular, it is pointed out that where cheating is strongly suspected, the officer concerned may be retired compulsorily by application of the provisions of section 8 of the Pensions Act (Cap. 189).

Permanent Secretaries/Heads of Department are requested to bring the provisions of this circular to the attention of all officers and to ensure that the provisions of Regulation G 44 of the Code of Regulations in regard to retirement on attainment of the age of 55 years are strictly observed.

A.K. KANDIE

Permanent Secretary/Director of Personnel Management”

The circular was copied to officers across the Government including to the Registrar, High Court of Kenya.

The Office of the Prime Minister, Ministry of State for Public Service issued circular Ref. No. DPM PA/5/7 VOL. LII/ (170) dated 25.09.2008 titled “AMENDMENT / VARIATION OF DATE OF BIRTH”. The circular referred to and reproduced the circular by the Directorate of Personnel Management Ref. No. DPM 7/7/43A Vol. IV/ (125) dated 15.11.1982 and concluded thus,

“It has been decided that with effect from the date of this circular, dates of birth as voluntarily declared on first appointment shall be maintained without variations. The Ministry of State for Public Service will no longer consider any requests for variation of dates of birth. Heads of Human Resource Management Divisions in Ministries / Departments should ensure that dates of birth as declared on first appointment are maintained without variation.

Authorized Officers are requested to note the contents of this circular and take necessary action accordingly.

Signed

Titus M. Ndambuki, CBS

PERMANENT SECRETARY”

The circular was addressed to “All Permanent Secretaries / Authorized Officers” The Ministry of Devolution and Planning, Directorate of Public Service Management issued a reminder circular Ref. No. MDP/DPSM.2/3 dated 14.10.2013 referring to the circular Ref. No. DPM PA/5/7 VOL. LIII/ (170) dated 25.09.2008 thus, “In the circular it was communicated that dates of birth as voluntarily declared by officers on first appointment shall be maintained without variation. It was further decided that the Ministry would no longer consider any requests for variation of dates of birth and that Heads of Human Resource Management Divisions should ensure that dates of birth as declared on first appointment were maintained without variation.” The reminder was signed by Juster Nkoroi, EBS, Principal Administrative Secretary, and addressed to “All Authorised Officers”

34. It is my view that the circumstances of the suit herein are different from those that was the subject of the decision relied upon by the Petitioner. In that suit, the date of birth in the employment records of the Exparte Applicant read 1949.
35. The employer of the Exparte Applicant explained that according to government policy, where only the year is indicated under date of birth it is deemed that the date of birth is 1st July of that year.
36. The Exparte Applicant however had obtained a birth certificate giving the date of birth as 30th December 1949. The birth certificate did not alter the year of birth. It only specified the actual date of birth in the same year, which had not been stated in the employment records.
37. The birth certificate therefore only clarified the date in the year when the Exparte Applicant was born but did not change the year of birth.
38. In the instant suit the Petitioner alleges his actual date of birth is 28th November 1965. The identity card he produced at the time of engagement gives his birth date as 1961, without specifying the month. This is also what he entered in the application for employment form. His only explanation is that he was changing the date of birth in his new identity card to conform with his birth certificate obtained long after he was employed.
39. The Petitioner has not explained the discrepancy in the date of birth between his identity card that he used at the time of recruitment on 8th August 1986 and his birth certificate obtained on 9th November 1999.
40. The circular dated 19th November 2020 was issued pursuant to the judgment referred to above as clear from paragraph 2 of the said circular and which in my view was erroneous, as what was implied in the judgment is not what is stated in the circular.
41. Retirement age for civil servants and public servant is not only provided for in circulars. It is provided for in several legislation including the Pensions Act, the Pensions (Increase) Act, the Provident Fund Act, the Widows and Orphans Pension Act, among others. The Pensions Act specifically provides for compulsory retirement age for public servants entitled to pension for the government.
42. As pointed out by the Respondent, the Employment Act requires employers to keep records of particular of employees, and among the particulars to be kept is the age of an employee according to information supplied by an employee.
43. It is my view that the Respondent was within its rights to use the date of birth in its records to determine the date of compulsory retirement for the Petitioner in view of the fact that he had not, during his long service spanning 1986 to 2020 when he received the retirement notice, informed his employer of any change in the particulars of his date of birth.
44. I find that the Petitioner has not proved any breach of his constitutional rights to warrant the grant of any of the prayers sought in the petition. Specifically, the Petitioner failed to prove that his date of birth as contained in his records of employment held by the Respondent and which were voluntarily provided by him at the time of retirement was not his actual date of birth.
45. The petition is accordingly dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article

159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE