



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC PETITION NO. 201 OF 2020

ENGINEER SAMWEL OGOLA OGEGE.....PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF TRANSPORT AND PUBLIC WORKS

(STATE DEPARTMENT OF INFRASTRUCTURE).....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA).....2ND RESPONDENT

PUBLIC SERVICE COMMISSION (PSC).....1ST INTERESTED PARTY

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES

JUDGMENT

1. The petitioner brought the petition on 3rd December, 2020 praying for orders that:-

1. **A Declaration** be and is hereby issued that the Respondents' acts/omissions complained are in violation of petitioner's constitutional rights and fundamental freedoms set out in articles 27 91) (4), 41(1), 47, 54(1) (a) of the Constitution of Kenya and Article 7 of the Universal Declaration of Human Rights.

2. **A Declaration** be and is hereby issued that the retroactive application of Regulation 70 2(b) of the Public Service Commission, Regulations, 2020 by the Respondents is unconstitutional, unlawful, null and void to the fullest extent that it purports to deny the petitioner the privilege of continuing to work in public service until he attains age 65 years, the mandatory retirement age for persons with disabilities.

3. **A mandatory injunction** be and is hereby issued directed at the 2nd Respondent and the 1st interested party to forthwith process, approve and do all things necessary to procure that the petitioner's retirement ages is extended to 65 years being the retirement age for persons with Disability.

4. **A permanent prohibitory injunction** be and is hereby issued restraining the Respondents and/or the 1st interested party, their 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.

5. **An Order** be and is hereby issued directed at the 2nd 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.

6. **An Order** be and is hereby issued directed at the Respondents 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.

7. The costs of this petition be borne by the Respondents.

8. Any such other orders this Honourable Court shall deem just.

2. The Petition was accompanied by a notice of motion application which sought interim injunctive reliefs pending the hearing and determination of the petition.

3. The interim orders sought were granted by Hon. Justice Rika, J. on 7th December, 2020 to wit:-

“2 That a conservatory order is issued restraining the Respondents’ and 1st interested party and/or any person acting under their instruction from retiring the petitioner from the Public Service pending hearing and determination of the application interpartes.”

4. The said interim orders are still in place pending the hearing and determination of the petition.

5. At the time the petition was brought, the petitioner was still in the service of the 2nd respondent and continues to be fully remunerated in terms of the position held.

Facts of Case

6. The Petitioner was first employed by the 1st respondent in 1986 and thereafter seconded to the 2nd respondent by a letter dated 18th November, 2009.

7. By a letter dated 26th November, 2014, the 1st interested party transferred the pensionable service of various officers in the Ministry of State Department of Infrastructure including the petitioner from the Civil Service to the 2nd Respondent with effect from 1st March, 2014.

8. During the employment of the petitioner with the 2nd respondent, the petitioner was involved in an accident in 2014 while on official duty at Mbita Causeway Replacement Bridge Construction Project and he suffered a leg injury.

9. It is common cause that the petitioner is now a Person With Disability (PWD) registered with the National Council for persons with Disability (NCPWD) with effect from 20th June, 2019 under Certificate No. NCPWD/483308. This status was occasioned by the aforesaid injury in the course of duty.

10. It is also common cause that the Ministry of State for Public Service issued a circular dated 29th May, 2012 in which it was notified that People With Disability in the public service would continue to work until the retirement age of 65 years.

11. That the 1st respondent wrote a letter dated 18th February, 2019 addressed to the petitioner and forwarded to the 2nd Respondent stating that according to its records, the petitioner’s mandatory retirement would be on 30th June, 2020. The 2nd Respondent was informed that the petitioner would therefore retire from service with effect from 1st July, 2020 in accordance with Regulation R19(1) of the Code of Regulation (***Revised 2006***).

12. The 1st Respondent further informed the 2nd Respondent that his salary up to and including 30th June, 2020 would be paid subject to submission of a clearance certificate.

13. Further, the petitioner was eligible for payment of pension under the Persons With Disability Act (***Cap. 189***) for the period he had served on permanent and pensionable terms of service.

14. The 2nd Respondent further informed the petitioner that he would be required to arrange to proceed for his 30 calendar days terminal leave whilst his terminal dues are being processed upon receipt of a Clearance Certificate.

15. By a letter dated 12th September, 2019, the Petitioner informed the Director General of the 2nd Respondent that he had since been registered as a person with Disability and by a further letter dated 14th February, 2020, the petitioner required the Director General of the 2nd Respondent to review his retirement age to 65 years as a Person With Disability.

16. In response to the above letter, the 1st Respondent through its letter dated 14th August, 2020 addressed to the Director General of the 2nd Respondent noted that according to Section 70(2) (b) of the Public Service Commission of Kenya (PSC) K. Act 2020, the Petitioners’ name should have been registered in the National Council for Persons with Disabilities database at least three years before the date of his retirement and that a tax exemption certificate should have been granted by that time.

17. The petitioner states that the alleged Regulations referred to in the letter dated 14th August, 2020 were not applicable as at the time of the application by the petitioner for review of his retirement age dated 14th February, 2020, the said regulation having come into effect on 28th January, 2020 and therefore could not be applied to him retroactively.

18. The petitioner consequently submitted an appeal requesting to be allowed to continue with his employment service until the age of 65 years. The Appeal was tabled before the Board of Directors of the 2nd respondent and on 13th October, 2020, the Board approved the retention of the petitioner in service for a period of one (1) year with effect from 1st July, 2020 to 30th June, 2021 or until the determination of his appeal on retirement date to the 1st Respondent, whichever is earlier. The Board also resolved to continue paying the petitioner his current salary.

19. The Petitioner apprehensive of the impending retirement filed this petition dated 1st December, 2020.
20. The 1st interested party meanwhile by a letter dated 17th March, 2021 informed the Director General of the 2nd Respondent that the Public Service Commission had declined the petitioner's request to retire from the service at the age of sixty five years on ground of disability. The letter directed the 2nd Respondent to take the necessary action.
21. The petitioner filed a contempt application dated 22nd April, 2021 following the directives by the 1st interested party. Thereafter the contempt of Court application was compromised following the 1st interested party's letter dated 6th May, 2021 in which it stated, it had decided to suspend the implementation of its decision contained in its letter dated 7th March, 2021.
22. The 1st respondent and 1st interested party filed a replying affidavit sworn to by **Professor Paul M. Maringa**, the Principal Secretary in the State Department of Infrastructure with the Ministry of Transport, Infrastructure, Housing Urban Development and Public Works (**hereinafter "MOTIHUD & PW"**) in response to the application and the petition in which the 1st Respondent and the 1st interested party vehemently deny that they intend to illegally and unconstitutionally retire the petitioner from service. They state that the petitioner having attained the mandatory age of 60 years ought to have left the service on 30th June, 2020 upon attainment of the 60 years mandatory retirement age.
23. That the claim by the petitioner that he should retire upon attainment of 65 years is not grounded in law and therefore cannot stand.
24. That the petitioner was notified of impending retirement with effect from 30th June, 2020 by a letter dated 18th June, 2019, and the petitioner thereafter rushed to initiate his registration as a person with disability thereafter.
25. That it was not until 12th September, 2019 when the petitioner responded to the 2nd respondent stating that he had successfully registered with the 2nd interested party as a person with disability.
26. That the petitioner never did any application for extension of his retirement age until 14th February, 2020 when he wrote to the 2nd Respondent seeking a review of his retirement date on the basis that he had registered with the 2nd Interested party as a member.
27. Therefore, the Public Service Commission Regulations of 28th January, 2020 is applicable to the petitioner since he was notified of his retirement on 18th February, 2019 and the regulation were promulgated on 28th January, 2020, before the due date of retirement on 30th June, 2020.
28. That the petitioner having failed to comply with the requirements enlisted under Regulation 70(2) of the Public Service Regulations, cannot be considered for retirement as a person with disability.
29. That Regulation 70(2) requires that for any person to be considered for retirement as a person with disability, he/she must, *inter alia*, "have 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 and also to be registered by the National Council for persons with Disability and have a tax exemption certificate from the Kenya Revenue Authority as a person with disability.
30. That the petitioner has not complied with all these requirements having obtained a registration Certificate on 20th June, 2019, and has not complied with the three year requirement nor has he obtained and/or filed a tax exemption certificate with his employer's Human Resource database.
31. That the petitioner has slept on his rights since the year 2014 when he suffered the accident and cannot now be helped by the Court.
32. That the petition lack merit and it be dismissed with costs.
33. The parties filed written submissions restating their positions set out herein before and the issues for consideration are as follows:-
- (i) ***Have the respondents and interested parties breached the petitioner's statutory right to retire at Age 65 years as a Person With Disability?***
 - (ii) ***What is the effective date of Regulation 70(2) (b) of the Public Service Commission Regulation, 2020, and whether is applicable to the petitioner.***
 - (iii) ***Whether any of the cited Constitutional rights of the Petitioner have been violated by the respondent and interested party.***

Determination

34. Disability of Persons is defined under Section 2 of Persons with Disability Act, No. 14 of 2003 thus:-

"disability" means a physical sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity, which impacts adversely on social economic or environmental participation;"

35. Under the provisions of Section 7(1) (c)

(1) The functions of the Council shall be:-

(a)

(b)

(c) to register

(i) **Persons with disabilities**

(d) to provide to the maximum extent possible.

(i)

(ii)

(iii) *access to available information and technical assistance to all institutions, associations, and organizations, concerted with the welfare and rehabilitation of persons with disability including those controlled and managed by Government.”*

36. By analogy, the petitioner shall attain 65 years of age by 30th June, 2025.

37. The cause of action herein was actuated by a letter by the 2nd respondent intending to retire the petitioner with effect from 1st July, 2020 in accordance with Regulation R19(1) of the Code of Regulations (**Revised 2006**) upon attaining the age of 60 years.

38. The petitioner appealed the decision by the 2nd respondent to retire him upon attaining 60 years of age instead of 65 years of age being a person with disability and duly registered by the Council as at 20th June, 2019.

39. That the injuries that caused the petitioner to be registered as a person with disability occurred in the cause of his duties with the 2nd Respondent in the year 2014. This fact is also not in dispute.

40. The 2nd respondent and the 1st interested party have declined to extend the retirement age of the petitioner to 65 years as requested relying on Public Service Commission Regulation promulgated on 28th January, 2020 in terms of which Section 70(2) (b) of the Public Service Commission K. Act, 2020 which provides that the petitioner’s name should have been registered in the National Council for Persons With Disabilities database at least three years before the date of his retirement and a tax exemption Certificate should have been granted by that time.

41. The petitioner has submitted that the 2nd respondent and the 1st interested party cannot in law apply the aforesaid regulation retroactively since that would violate the Statutory Instruments Act No. 23 of 2013 which provides at Section 23(1) that:-

“A statutory instrument shall come into operation on the date specified in that behalf in the statutory instrument or if no date is so specified, then subject to subsection (2) it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable. “

42. In this respect, the impugned Public Service Commission Regulations 2020 came into effect on 28th January, 2020 and therefore cannot apply retroactively to the petitioner who suffered permanent disability in the year 2014, and was registered as a Person with Disability on 20th June, 2019, since there was not in place at the time any policy document that required him to register with the Council at least three years to the date of his attaining 60 years of age.

43. That such retroactive application is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and so violates Article 24(1) of the Constitution of Kenya which only allows limitation of certain rights and fundamental freedoms based on the aforesaid criteria.

44. In 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**, Abuodha, J. 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.”
(emphasis mine)

45. Based on the foregoing exegesis, the impugned Public Service Commission Regulation 2020, which came into operation on 28/1/2020

cannot be applied to the petitioner retroactively and thus the decision by 2nd respondent and the 1st interested party is arbitrary, unreasonable, unjustifiable and null and void *ab initio*. The petitioner became eligible to retire at age of 65 years upon being diagnosed with permanent disability by a medical practitioner in the year 2014 which position was validated by the Council as a matter of procedure and policy on 20th June, 2019, when the Council granted the petitioner the certificate of disability Reg. No. NCPWD/1/483308.

46. Upto this point, the issue of retirement was in any event guided by the Public Service Commission circular dated 29th May, 2012 which did not provide the onerous and apparently unreasonable and capricious conditions which the 1st respondent and the 1st interested party sought to visit unlawfully on the petitioner.

47. In *Samuel Kamau Macharia and Another –vs- Kenya Commercial Bank Limited & 2 Others [2012] eKLR*, the Supreme Court stated:-

“A retroactive law is not unconstitutional unless it:-

- (i) is in the nature of a bill of attainder;**
- (ii) impairs the obligation under contracts;**
- (iii) divests vested rights; or**
- (iv) is constitutionally forbidden.”**

(emphasis mine)

48. The impugned Public Service Commission Regulation, 2020 purports to divest the petitioner of vested rights and therefore on that score alone the application of the regulation on the petitioner is unconstitutional.

49. As we noted earlier in this judgment, by the time the petitioner came to Court, the premature retirement at age 60 had not been placed into effect. The Petitioner had continued to work without loss of any benefits. The income earned during this period is pensionable being payment of the petitioner’s pensionable earning until the attainment of 65 years of age as a person with disability in the Public Service.

50. Accordingly, the petitioner has not proved that any of his rights and or freedoms have been violated by the respondents and the interested parties. Indeed the interested parties are to be commended for obeying the injunctive reliefs granted by the Court as soon as the suit was filed in Court.

51. In the final analysis, the petition succeeds and the reliefs sought granted as follows:-

(a) A declaration is hereby issued that the retroactive application of Regulation 70(2) (b) of the Public Service Commission, Regulations, 2020 by the 2nd Respondent and the 1st interested party is unconstitutional, unlawful, null and void to the extent that it purported to deny the petitioner the right to retire upon attaining 65 years of age being a person with disability.

(b) A mandatory injunction is hereby issued directed at the 2nd respondent and the 1st interested party to forthwith process, approve and do all things necessary to procure that the petitioner’s retirement age is extended to 65 years being the retirement age of persons with Disability.

(c) An order be and is hereby issued directed at the 2nd respondent to further pay the petitioner any and all salaries, benefits, and or emoluments due but not remitted on account of the unlawful withholding of the same.

(d) Costs of the suit be borne by the 2nd respondent and the 1st interested party.

Dated and delivered at Nairobi (virtually) this 10th day of February, 2022.

Mathews N. Nduma

Judge

Appearances

M/s Achieng for the Petitioner

Mr. Mulili for 1st Respondent

M/s Koech for the 2nd Respondent