



**Alas Hassan v National Police Commission & 3 others; NCPWD (Interested Party)
(Petition E032 of 2022) [2022] KEELRC 4856 (KLR) (4 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4856 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E032 OF 2022**

M MBARÚ, J

APRIL 4, 2022

BETWEEN

IDLE ALAS SHEIKH HASSAN PETITIONER

AND

NATIONAL POLICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE . 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

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

RULING

1. The petitioner filed application dated February 15, 2022 under the provisions of article, 1, 3, 19, 27, 41, 47, 54, 260 and 258 of the Constitution ad rules 3, 4, 8, 13, 19 and 24 of the Constitution of Kenya (Protections of Rights and Fundamental Freedoms) Practice and Procedure Rules ad seeking of orders that;
 1. Pending hearing and determination of the petition the 1st and 2nd respondents to retain the petitioner in employment at the prevailing rank, pay and benefits without termination of his service/or employment on account of attainment of retirement age.
 2. The court be pleased to issue an order restraining the 1st and 2nd respondents jointly and severally, either acting on their own and or through its agents, employees, servants, and/or any others person acting and/ or purporting to act under their instruction and/or orders from



executing the said respondents' decision to retire the petitioner on June 30, 2022 as indicated in his pay slip for January, 2022 pending the hearing and determination of this petition.

2. The application is supported by the attached affidavit of the petitioner and on the grounds that the petitioner joined the Kenya Police service on October 1, 1989 as a cadet inspector and posted to Bungoma and later worked as a police prosecutor in Kisii, Kakamega, Moyale, Malindi, Mombasa and Nairobi. He later joined the Criminal Investigations Department (CID) and served as DCIO in various stations and later promoted to regional Commander Northern Police where he served from 2018 to 2019.
3. The petitioner was then transferred to Directorate of Criminal Investigations (DCI) headquarters where he is currently serving as the Deputy Inspection and Quality Services Officer.
4. On September 20, 1989 the petitioner was involved in an accident while on duty where the Somali National Army attacked the police while at Hara Hare guarding a new site repeater station. The petitioner suffered injuries to the head which affected his hearing which has deteriorated and in the year 2020 he visited the Garissa Ear, Nose and Throat medical centre for treatment where he was referred to Kenyatta National Hospital (KNH) where he was diagnosed with a permanent hearing loss on the right ear and moderate hearing loss on the left ear and further recommended that he obtains aid and be registered as a person with disability.
5. The petitioner applied to be assessed as a person with disability which the Ministry of Health did and found him with a permanent hearing disability on May 4, 2020 and he was issued with a registration card by the National Council for Persons with Disability.
6. On May 29, 2012 the government through the Ministry for Public Service issued a directive including the respondents that the mandatory retirement age of public servants with disabilities was raised to 65 years. On May 4, 2020 the NCPD wrote a letter to the 2nd respondent recommending the extension of retirement age of the petitioner from 60 years to 65 years. The petitioner also applied for tax exemption certificate by the Kenya revenue Authority (KRA) which was issued with effect from August 1, 2020 for a period of 5 years.
7. The tax exemption and extension of retirement age has not been effected by the respondents and the pay slips still indicate the retirement age is June 30, 2022 with a deduction of PAYE contrary to regulations of the exemption.
8. On January 31, 2022 the petitioner wrote to the respondents seeking reimbursement and extension of tax exemption and retirement age and there was no response and the 2nd respondent responded to the effect that the issue of police officers living with disabilities is being assessed and direction will be given without giving specification or approval from the 3rd respondent or the NCPD.
9. Unless the court issues the orders sought the petitioner shall suffer irreparable loss and damage and retired before he attains 65 years and his rights in law and under the Constitution be violated.
10. In reply, only the 2nd respondent filed the replying affidavit of Mwangi Wanderi a commissioner of police in the service of the 1st respondent attached to DCI as Director of Human Capital Development and who avers that he has duties of deployment and placement of officers, promotions, welfare and other matters. He avers that the petitioner's application is premature as he has chosen to ignore internal mechanisms in place to raise his grievances if any and decided to taint the image of the directorate without exhaustion of the Service Standing Orders.



11. Commissioner Wanderi also avers that the petitioner was enlisted into the service on 1st October, 1988 and has served for 33 years and has served in various capacities and stations his last position being DCI as Deputy Inspection and Quality Services Officer.
12. From the petitioner's records, he was born in 1962 without specifying the date or month and in line with government policy, where an officer only indicates the year of birth on the Parliamentary Service Commission form he is deemed to have been born on the 1st July of that year. The petitioner was therefore issued with a retirement notice on September 7, 2020 and is therefore required to retire on July 1, 2022.
13. On May 4, 2020 the petitioner applied for a 5 year extension of service on the basis of being a person with disability registered with NCPD and this was placed with the 2nd respondent for consideration.
14. The petitioner alleges that he was involved in an accident on September 20, 1989 while at Hara Hara and sustained head injuries which led to hearing impairment and without overlooking the agony he endured over the years, the petitioner failed to do due diligence by following the laid down police procedures in relation to sick/injured police officers while in line of duty but instead applied to NCPD for registration on May 4, 2020 having knowledge that he was about to be served with the retirement notice that year and therefore this seems to be an afterthought. There is no record showing the petitioner's disability assessment report since the alleged time of the accident in 1989 to 2020 however he alleges to have been diagnosed with hearing loss at KNH and assessment done by the Ministry of Health.
15. Commissioner Wanderi also avers that the petitioner ought to have incorporated the DCI where he is currently stationed while applying to be registered with NCPD so as to appear before the National Police Service Medical Board assessment and ascertain whether or not he should continue serving or be removed under medical grounds as per the stipulated *Police Regulations*. The *National Police Service (Recruitment and Appointments) Regulations*, 2015 that the health status both physical and mental is a key consideration in the employment of a police officer due to the nature of duties and hence the importance of an honest declaration to report any disease or injury during service to determine suitability to continue serving.
16. The 2nd respondent in a letter dated December 5, 2019 raised concern of extension request of retirement by officer living with disability to the 1st respondent and who by letter dated October 13, 2020 responded and noted that it had requested for doctors from the Ministry of Health to form a special medical board that will assess the sick officers with a view to determine their fitness to continue in service or be retired on medical grounds which matter is still in progress.
17. The 1st respondent through letter dated February 3, 2022 wrote to the petitioner that a special medical board to assess all officers living with disability had been constituted and directions issued pending communication.
18. The alleged unlawful deduction of income should be followed through the Human Resource Department and IPPD and the Director, DCI cannot deviate from the procedure that has applied uniformly to other officers living with disability who have applied for extension of services and still waiting for review of their extension by the 1st respondent which would be prejudicial and inconsistent to Service Regulations and only fair that the application herein be dismissed for lack of merit.

Parties Attended And Made Oral Submissions

19. The petitioner submitted that following injury while at work in the year 1989 he has suffered hearing impairment and was assessed at KNH and registered by the NCPD as a person with disability.



- He applied to KRA for tax exemption and despite being issued with a certificate and serving the respondents they have refused to effect the same and further issued him with a retirement notice effective June 30, 2022 at age 60 instead of allowing him to serve to 65 years as a person with disability. The NCPD wrote to the respondents to extend the petitioner's retirement but has continued to issue him with pay slips indicating date of retirement to be June 30, 2022.
20. The respondents have written back to the petition indicating that they have constituted a medical board to assess all officers with disability to ascertain whether they are fit for service but under the Public Service Commission Regulations a second medical assessment can only be done if there is doubt of disability and the respondent has not challenged the Ministry of Health and KNH assessment of the petitioner so as to subject him to a second medical test/assessment.
 21. On March 18, 2022 the petitioner was sent on terminal leave and hence seek interim orders to secure his employment.
 22. The 1st respondent submitted that the petitioner is covered by the Standing Orders and the police service is not part of public service regulated under the Public Service Commission. The Standing Orders do not address persons with disability and hence oppose the application.
 23. The 2nd and 4th respondents submitted that the petitioner shall not suffer any damage since the petition has no chances of success. The petitioner is a police officer about to retire. The police service is special with rules and the Public Service Commissions and its regulations do not apply to police officers. The petitioner alleged that he suffered an accident in the year 1989 but remained in service without such matter being addressed until he knew his notice to retire was about to issue.
 24. Police service cannot be related to other employees as the service needs to be stable under its own regulations separate from the regulation for persons with disability. Retirement on medical grounds or in the public interest is allowed since the police service is not regulated under the Employment Act.
 25. A team of the respondent has been constituted to address the case of all officers with disability and consider own assessment and it will be improper for an officer of the rank of the petitioner to be allowed to continue in service while the respondent is investigating his medical condition and his application should be dismissed.
 26. The 3rd respondent submitted that the KRA is wrongly enjoined in these proceedings since they issued the petitioner with Certificate of exemption upon application which is not disputed and shall abide the orders of the court. Where the employer continues to deduct PAYE despite the KRA certificate of exemption, there are mechanisms for application for a refund. The KRA has no other role in these proceedings and should be removed.

Determination

27. At this stage, the issue for determination is whether in the interim and pending hearing of the petition herein the court should direct the 1st and 2nd respondents to retain the petitioner in the service following notice to retire on June 30, 2022.
28. The petitioner's case is that he is registered a person with disability with the NCPD and has applied for tax exemption and obtained certificate of tax exemption from KRA and therefore the 1st and 2nd respondents should extend the retirement age to 65 years and stop PAYE deductions on his salary.
29. The 1st respondent as noted above did not reply to the facts of the application save to urge the court that there exists Standing Orders which regulate police officers and the petitioner failed to apply the same.



30. The 2nd and 4th respondents' case is that there is no proper petition as the petitioner moved the court prematurely and before exhaustion of internal mechanisms and the Standing Orders dealing with health status of police officers. Since the year 1989 the petitioner has not addressed any issue of his disability with the employer until he knew the retirement notice was about to issue. The [Employment Act](#) does not apply to him and the Public Service Commission and regulation are not applicable to the petitioner.
31. On the other hand, the 3rd respondent's case is that it is not a proper party herein since the petitioner applied for tax exemption upon registration as a person with disability and certificate has since issued. Where the employer fails to effect the tax exemption, the petitioner has the option to apply for the same under the applicable law.
32. The petitioner has moved the court by way of a constitutional petitioner premised under the various provisions of the [Constitution](#) and particular article 258 which allow every person the right to institute court proceedings, claiming remedy for rights contravened or threatened and which are secured under the [Constitution](#), 2010. See [Sammy Osundu Likaroni – Interested Party \(On Behalf of Senior Court Assistants – JSG.7\) Formerly \(Senior Clerical Officers\) and all other affected Judicial Staff v Judicial Service Commission & 3 others](#) [2020] eKLR where the court held that;
33. The petitioner having anchored the petition under the provisions of article 258 of the [Constitution](#) enjoys special standing with the court to attend and urge the matters set out therein. He not only contends that there is not only a threat to the violation of the [Constitution](#) but that the [Constitution](#) has in fact been violated by the Respondents.
- Article 258 of the [Constitution](#) provides as follows;
1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. ...
34. In this case, the petitioner has not invoked the provisions of the [Employment Act](#), 2007 as alleged by the 2nd and 4th respondents. It is not contested that the petitioner is in the service of the 1st and 2nd respondents and under such has been issued with a retirement notice taken effect on June 30, 2022. Under such notice, the petitioner has challenged the same vis-a-vis his constitutional rights.

The Petitioner Is Properly Before This Court

35. On the joinder of the 3rd respondent, the petition is that despite the KRA issuing the petitioner with tax exemption certificate, the 1st and 2nd respondents have failed to address and continues to effect PAYE. The intricacies of tax deductions, whether to deduct or not and how to recover the same if this is not effected at source and the attendant reasons then becomes an integral issue for determination in these proceedings. The 3rd respondent is a necessary and relevant party herein and has properly been enjoined.
36. Whereas the police service is regulated under the [National Police Service \(Recruitment and Appointments\) Regulations](#), 2015 and which address the health status both physical and mental of persons being considered for employment as police officers and due to the nature of duties of serving officers they are at that stage made to declare and to cases of disease or injury during service to determine suitability to continue serving, the petitioner is claiming under disability and not disease of injury at this stage. Where the Regulations requires that before employment into the sieve one has to make a



declaration, once recruited and into the service, where there is disability, such must be looked at in the context of constitutional protections addressed under articles 27 and 54 of the Constitution, 2010.

37. The 2nd respondent asserted that there is letter dated December 5, 2019 which raised concern of extension request of retirement by officers living with disability. that the 1st respondent by letter dated October 13, 2020 responded and noted that it had requested for doctors from the Ministry of Health to form a special medical board that will assess the sick officers with a view to determine their fitness to continue in service or be retired on medical grounds which matter is still in progress.
38. Such matters of forming a special medical board to assess sick officers with a view to determine their fitness to continue in service or be retired on medical grounds and which is noted to be in progress, with tremendous respect, must be addressed in context and particularly where the court herein is invited to address the issues of an officer with disability has been issued notice to retire and the special Medical Board is out to assess sick officers with a view to determine their fitness to serve.

Should The Orders Sought In The Interim Issue?

39. The conditions required for the court to grant an interlocutory injunction had previously been settled following an approval of the landmark case of *Giella v Cassman Brown & Co Ltd*.

The three-part test is therefore that;

- a. An applicant must show a *prima facie* case with a probability of success;
 - b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
 - c. If the court is in doubt of the two above principles, it will decide an application on the balance of convenience.
40. And in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* Civil Appeal No 39 of 2002, the court described *prima facie* case as;
- In civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
41. In this case, though are not contested that the petitioner has since been registered a person with disability and the 3rd respondent has since issued him with a tax exemption certificate; the 1st and 2nd respondent have not secured such matter and leading to this petitioner.
42. What is noteworthy is that the petitioner is still a serving officer under notice to retire on June 30, 2022. With an expedited hearing, the court can hear the main petition and issue judgement. Such will address the issues at hand with finality.
43. Above put into account, the orders sought in application dated February 15, 2022 shall not issue at this stage save hearing directions for the main petition shall issue. Costs shall abide the outcome of the petition.

DELIVERED IN COURT AT NAIROBI THIS 4TH DAY OF APRIL, 2022.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Okodoi



..... and

