



Hassan v National Police Service Commission & 3 others; National Council for Persons With Disabilities (NCPW) (Interested Party) (Employment and Labour Relations Petition E032 of 2022) [2022] KEELRC 12717 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 12717 (KLR)

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

**M MBARŪ, J
JUNE 30, 2022**

BETWEEN

IDLE ALAS SHEIKH HASSAN PETITIONER

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL NATIONAL POLICE SERVICE 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES
(NCPW)D INTERESTED PARTY**

JUDGMENT

1. The petitioner is seeking the following orders;
 1. A declaration be made that the petitioner’s right not to be discriminated against under article 27(4), (5), (6) and (7) of *the Constitution* has been violated.
 2. A declaration be made that the failure by the 1st, 2nd, and 3rd respondents to extend the petitioner’s retirement age from 60 years to 65 years and the unlawful deduction of Pay as You Earn (PAYE) is in total disregard of the stated government policy amounted to a violation of his right not to be discriminated against on the grounds of health, age and disability.



3. A permanent injunction be granted restraining the 1st and 2nd respondents, their servants and agents from retiring the petitioner from his present position and employment until attainment of 65 years.
4. An order that the respondents jointly and severally do reimburse the petitioner PAYE unlawfully deducted from his income from August 1, 2020 to date.
5. An order that the respondents jointly and severally do pay the petitioner general damages for illegal and unlawful deductions of PAYE and any other benefits accruing to the petitioner.
6. Costs of the suit.
7. Any further order or relief that his court may deem fit to grant in the interests of justice.

Petition

2. The petition is that the petitioner is a male adult in the service of the 1st respondent. The 1st respondent is an independent commission under Chapter Fifteen of *the Constitution*. The 2nd respondent is an office established under article 245 of *the Constitution*. The 3rd respondent is established under the *Kenya Revenue Authority Act* with mandate to assess, collect and account or all revenues in accordance with any written law. The 4th respondent is the office established under article 156 of *the Constitution* and the principal legal advisor to the government.
3. On October 1, 1988 the petitioner joined the Kenya police service as a Cadet Inspector and posted to Bungoma and later worked at various posts. The petitioner later joined the Criminal Investigations Department (CID) where he served as the DCIO at Railways, Makeni, and Kuresoi and then promoted to Regional Commander Northern Police where he served from 2018 to 2019. He was then transferred to the DCI headquarters where he is currently serving as the Deputy Inspection and Quality Service Officer.
4. The petitioner was involved in an accident while on duty on September 20, 1989 where the Somali National Army attacked the police at Hara Hara and as a result he suffered injuries to the head and which affected his hearing. The hearing deteriorated and in the year 2020 the petitioner visited Garissa Ear, Nose and Throat Medical Centre for treatment where he was referred to Kenyatta National Hospital (KNH) and given a diagnosis that he had a permanent hearing loss on the right ear and moderate hearing loss on the left ear and recommended that he obtains hearing aid and be registered as a person with disability.
5. The petitioner applied to be assessed as a person with disability by the Ministry of Health which found him to be a person with a permanent hearing disability on May 4, 2020 and was issued with a registration certificate by the National Council for Persons with Disability.
6. On May 29, 2012 the Permanent Secretary Ministry of State for Public Service issued directives to government and departmental heads inducting the respondents that the mandatory retirement age of public servants with disabilities was raised to 65 years. On May 4, 2020 the NCPWD wrote to the 2nd respondent recommending the extension of the retirement age of the petitioner from 60 years to 65 years. The petitioner also applied to the 3rd respondent for tax exemption as a person with disability and was issued with an Income Tax Exemption Certificate for a period of 5 years with effect from August 1, 2020 to July 31, 2025.



7. The exemption and extension of retirement age were not accepted or effected by the 1st and 2nd respondent and the payment slip for January, 2022 indicates the retirement age is June 30, 2022 and PAYE was deducted.
8. On January 31, 2022 the petitioner wrote to the respondents seeking reimbursement of PAYE and extension of the retirement age but there was no response save the 2nd respondent gave a general response that police officers living with disabilities would be assessed and direction given without giving specifics or addressing the petitioner's complaints and despite attaching all the necessary documents from the 3rd respondent and the NCPWD.
9. From January, 2022 the petitioner's pay slip has indicated that his retirement date is 30th June, 2022 when he attains 60 years and unless the orders sought are issued he shall suffer irreparable loss and damage and the directions to be retired before 65 years is discriminatory and unlawful after serving the respondent for over 34 years and suffered disability in the course of employment. Such is in violation of his constitutional rights under article 27 (4) of *the Constitution* which prohibits discrimination on the grounds of age, health and disability. The Public Service Commission has since issued guidelines with regard to the retirement age to officers with disability at 65 years and the 3rd respondent has issued a Certificate of Tax Exemption but the respondent has refused and failed to comply.

Responses

10. There is no response by the 1st respondent.
11. In reply to the petition, the 2nd respondent filed the Replying Affidavit of Mwangi Wanderi, a Commissioner of Police attached to the Directorate of Criminal Investigation as the Director of Human Capital Development and avers that the petitioner has chosen to ignore internal mechanisms to raise his grievances is any and decided to taint the image of the respondents before exhausting the Service Standing Orders which lays down procedures to be adopted by an aggrieved officer. The records held by the respondents show the petitioner was enlisted in the Service on October 1, 1989 a period of over 33 years. He served in various stations up to date and is currently attached at the DCI headquarters in Nairobi County as Deputy Inspection and Quality Service Officer. His personal documents show he was born in 1962 without a date or month and in line with government Policy, where an officer only indicates the year of birth on the Parliamentary Service Commission form one is deemed to have been born on the 1st day of July of that year.
12. The petitioner is therefore required to retire from 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 and had been registered by the NCPWD and the request was placed with the 1st respondent for consideration. The petitioner alleges that he was involved in an accident in the course of duty on September 20, 1989 while serving at Hara Hara and as a result it affected his hearing. Over the years the petitioner failed to do due diligence by following the laid down procedures and instead applied to the NCPWD and issued with a card on 4th May, 2020 having knowledge he was about to retire in a year which moves seems to be an afterthought.
14. There is no record showing the officer's disability assessment report since the alleged time of the accident in the year 1989 until 2020 even though he alleges that hearing loss was assessed at KNH and assessment by the Ministry of Health.
15. The petitioner ought to have incorporated the Directorate of Criminal Investigations where he is currently stationed while applying to be registered with the NCPWD so as to appear before the



- National Police Service Medical Board assessment and ascertain whether or not he should continue serving or be removed from service under medical grounds as per stipulated Police Regulations.
16. Under paragraph 9(1) (e) of the *National Police Service (Recruitment and Appointments) Regulations, 2015* the health status of both physical and mental is a key consideration in the employment of a police officer due to the strenuous nature of police duties hence the importance of an honest declaration at the point of employment and constant report in the case of disease or injury during service to determine suitability to continue serving.
 17. The 2nd respondent in a later dated December 5, 2019 raised the concern of extension request of retirement by officers living with disability to the 1st respondent. In response, the 1st respondent in a letter dated October 13, 2020 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 serving or be retired on medical grounds and which matter is still in progress.
 18. By letter dated February 3, 2022 the 1st respondent wrote to the petitioner and noted that a special board had ben constituted and communication would be issued and the allegations made in the petition are without justification and should be dismissed with costs.
 19. Parties agreed to address the petition by way of written submissions.
 20. The petitioner submitted that he is registered as a person with disability and is entitled to extension of his retirement age in accordance with article 260 of *the Constitution* which define disability read together with section 2 of the *Persons with Disabilities Act*. Upon the petitioner being registered by the NCPWD as a person with disability, under Regulation 70 of the *Public Commission Regulations, 2020* he is entitled to retire at 65 years and not 60 years.
 21. The petitioner was assessed by the KNH and the Ministry of Health as a person with disability and issued with a certificate on May 4, 2020 and proceeded to KRA and was issued with Certificate of Tax Exemption which the respondents have refused to accept and effect causing the petitioner irreparable loss and damage. The requirement for be retired at 60 years is discriminatory and unlawful as held in *Mary Kerubo Ogoro v Public Service Commission* [2017] eKLR.
 22. The delay is getting registered as a person with disability should not be used to discriminate against the petitioner. Even though the accident occurred in the year 1989 resulting to injuries to the head, assessment was only done at KNH on February 6, 2020 where a diagnosis of hearing impairment was given. The NCPWD proceeded on the assessment by the Ministry of Health and issued a certificate. The retirement notice only issued after these facts on September 7, 2020. In the case of *Margaret Martha Byama v Alice A. Otwala & 3 others* [2016] eKLR the court held that the fact that the petitioner sought to be registered around the same time she was due for retirement ought not to be read much into since it was within her right to plead her disability to continue in service as per government policy for such persons.
 23. The petitioner followed the set procedures by the government through the Ministry of Health and the NCPWD and was registered lawfully and procedurally and should not be discriminated against on such basis. Under Regulation 70 of the *Public Service Commission Regulations, 2020* the petitioner is allowed to retire at 65 years having been registered as a person with disability and be tax exempted having lodged his application with KRA and was issued with a Certificate of Tax Exemption.
 24. The orders sough should issue with payment of damages for discrimination, a refund of all PAYE deduction and costs of the petition.



25. The 2nd and 3rd respondents submitted that the petitioner is challenging his retirement at age 60 and contends that he is registered as a person with disability and ought to retire at 65 years of age.
26. The petitioner only lodged his application seeking extension of the retirement age on May 4, 2020 after sustaining injury in the year 1989 a period of 31 years ago. The inordinate delay is not justified and should not be allowed to abuse the procedures in place.
27. Under Regulation 70 of the [PSC Regulations](#), an employee with disability is allowed to retire at 65 years but such person must be registered and placed in the database as a person with disability at least 3 years before the date of retirement. Where the subject employee acquires registration with NCPWD or Certificate of Tax Exemption after the 3 years period, such is not automatic evidence of disability.
28. The petitioner has acted outside PSC Regulation 70(2) and his possession of a registration certificate from NCPWD is not an automatic consideration of retirement at 65 years and he has failed to satisfy the regulations. In [Kenya Felix v Ministry of Education & 2 others](#) [2021] eKLR the court declined to grant an extension of retirement age despite the petitioner having registered with NCPWD on the grounds that disability did not meet the threshold set under the law and there was inordinate delay in complying with the formalities. In this case, the petitioner has been indolent. Such is without justification and the petition should be dismissed with costs.
27. The 3rd respondent submitted that it has since registered the petitioner and issued him with a Tax Exemption Certificate and it was upon the employer to stop deduction PAYE from him at source under the provisions of section 37 of the [Income Tax Act](#). The petitioner's employer is responsible for remitting the Petitioner's PAYE and it ought to have stopped deducting the same from his income upon receipt of the Tax Exemption Certificate issued by the 3rd respondent.
28. The petitioner ought to have followed the proper procedure and applied for a tax refund of the PAYE already remitted to the 3rd respondent through iTax portal which application can be processed within 90 days upon application pursuant to the provisions of section 47 of the [Tax Procedures Act](#), 2015. No application has been received by the 3rd respondent as held in Tax Appeal No.E033 of 2020 – [Commissioner of Domestic Taxes v Unga Limited](#).

Determination

29. What is missing in this case is a response to the petition or any submissions by the employer, the 1st respondent, the national Police Service Commission.
30. Such denied the court crucial details of the petitioner and on the matters addressed in the petition through the eye and perspective of the employer. The court takes it this is deliberate since the 1st respondent was served and a Counsel was in attendance on and off.
31. The petition is that while the petitioner was on duty on September 20, 1989, Somali National Army attacked the police, among them the petitioner while undertaking his duties at Hara Hare and he sustained injuries to his head and which affected his hearing. The petitioner went on to serve at various places in Railways, Makueni, and Kurusoi and was posted to the CID headquarters currently serving as Deputy Inspection and Quality Services Officer.
32. It is the petitioner's case that;
33. In 2020, the petitioner visited the Garissa Ear, Nose and Throat Medical Centre for treatment where he was referred to Kenyatta National Hospital (KNH). KNH gave him a diagnosis that he had



- a permanent hearing loss on the right ear and moderate hearing loss on the left ear and further recommended that the petitioner obtains a hearing aid and be registered as a person with disability.
34. The petitioner went through disability assessments and was issued with Certificate of disability by the NCPWD on May 4, 2020 which he placed with the employer. He was also issued with Certificate of Tax Exemption by the 3rd respondent and similarly placed with the employer.
 35. On September 7, 2020 the petitioner was issued with Retirement Notice taking effect on June 30, 2022. His payment statements (pay slips) reflected such matter and the date of retirement.
 36. Whereas article 27 of *the Constitution*, 2010 read together with articles 47 prohibits discrimination on any grounds and including age, disability and health and requires fair administrative action where the right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. With regard to retirement of a serving officer with the 1st respondent, the regulations thereto are to be found under the *Public Service Commission Regulations*, 2020 and not under the article 27 or 47 of *the Constitution*, 2010 which set the principle and allows the law and the regulations to go into the details.
 37. In this regard, Regulation 70 of the *PSC Regulations 2020* well cited by the petitioner to assert his right to retire at 65 years and not 60 years due to his disability should be read in whole and not in part. The court reading of Regulation 70(1) is that an serving officer mandatory retirement age is 60 years, a person with disability retires at 65 years or as determined by the regulations particularly for lecturers and research scientists serving public universities.
 38. Under Regulation 70(2) a public officer is considered for retirement as a person with disability where the officer has a disability of a permanent nature, is registered by the employer's human resource database as a person with disability for at least 3 years before the date of retirement, is registered by the NCPWD and has a tax exemption certificate form KRA.
 39. With regard to persons with disabilities, the core stature regulating rights thereof is the *Persons with Disabilities Act* and which allow for formulation of Regulations toward the progressive realisation of the rights thereof and in this regard, the NCPWD is allowed wide latitude to work and engage with other government agencies, departments and directorates to develop guidelines and regulations in this regard.
 40. The *PSC Regulations*, 2020 are one such policy Regulations and Regulations 70 thereof is a further elaboration of article 27 and 47 of the Constitutional fundamental rights and freedoms. It enhances the realisation of constitutional rights to ensure persons with disability retire at 65 years instead of the mandatory 60 years for other public officers and that a person with disability who is assessed through the Ministry of Health and registered with NCPWD shall ensure such matter is brought to the attention of the employer at least 3 years before the date of retirement for the employer to regulate its human resource and place such an officer in the database and automatically raise the retirement age from 60 to 65 years. such regulations are formulated by the PSC, the independent constitutional commission pursuant to its made under article 230 of *the Constitution*, 2010.
 41. The petitioner had an accident in the year 1989. He was born in the year 1962. Without a date and month, under the PSC regulations he attains 60 years in the year 2022. The automatic retirement year is 2022.
 42. The petitioner requested for extension of his retirement age through is letter dated May 4, 2020. He was issued with Notice of retirement on September 7, 2020. This matter has continued to be reflected on his payment statements as demonstrated on his attachments to the petition.



43. The instant petition was not filed until February 24, 2022 a period of less than 4 months before the mandatory date of retirement.
44. The petitioner though registered as a person with disability and a certificate issued by NCPWD and a tax Exemption Certificate issued by the 3rd respondent, the court reading of PSC Regulation 70 in whole is that from the year 1989 to May 4, 2020 the petitioner failed to abide such regulations and raise the matter with the employer at least 3 years before the retirement date. it cannot be discriminatory where the petitioner, well are of such regulations failed to assert his rights, sat back and waited until 4 months before the mandatory retirement date and on February 24, 2022 filed the instant petition.
45. The matter of discrimination against the petitioner is not weighed against any other employer or officer of the 1st respondent who was placed in similar circumstances and failed to act for 33 years and then at the eve of retirement moved to assert a similar right and was treated differently and preferentially and hence there is discrimination. Contrary to the assertions by the petitioner, he sat on his rights, if at all, and such cannot be cured with a declaration that he has suffered damage and should enjoy extension of the age of retirement after failing to address through the laid down procedures like he did with his disability assessment from Garissa ENT Centre to KNH and to the Ministry of Health and was eventually issued with a Certificate by the NCPWD and tax exemption by KRA.
46. The simple lapse to cause placement with the employer in the database pursuant to the PSSC Regulations renders the petition without foundation. The Regulations pursuant to the Person with Disabilities Act and the PSC Regulations must be read together and a diligent petitioner seeking to enjoy the rights therefrom cannot claim to have been discriminated against having failed the bare minimum.
47. The petition in this regard fails.
48. On the remedies sought, on the finding that the petition is without merits, mandatory retirement age is 60 years.
49. Employment status hence addressed, such shall suffice.
50. With regard to a claim for refund of PAYE deductions, even though this should be addressed at the source, where such deductions are erroneously and remitted by the employer under the mistaken belief that the petitioner was not a person with disability and should pay PAYE and be retired at 60 years, the petitioner is insulated from any losses pursuant to the provisions of section 47 of the *Income Tax Act* and the Regulations thereto which allow him to lodge his application with the 3rd respondent for a refund of any PAYE deducted and remitted by an employer at source without justification and outside the law.
51. Accordingly, the petition herein is dismissed. each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Peter Kigotho

..... and

