



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATION COURT
AT NAIROBI
PETITION NO. E049 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: THE CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 10, 27(4), (5) & (6), 41(1), 159, 258(1), 259(1) AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OF ARTICLE 7 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 2 & 15(1)(d) AND (6) OF THE PERSONS WITH DISABILITIES ACT, 2003

AND

IN THE MATTER OF: SECTION 5(3) OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: THE UNFAIR DISCRIMINATION ON GROUNDS OF DISABILITY

BETWEEN

KINYUA FELIX

PETITIONER

VERSUS

MINISTRY OF EDUCATION

1ST RESPONDENT

PUBLIC SERVICE COMMISSION

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

JUDGMENT

By a petition dated 21st September, 2020, the petitioner sought orders that:

1. A declaration be made to the petitioners right not to be discriminated against under Article 27(4), (5), (6) and 97) of the constitution of Kenya and Article 7 of the universal Declaration of the Human Rights had been violated

2. A declaration be made that the failure by the 1st, 2nd and 3rd Respondent to extend the petitioners retirement age from 60 years to

65 years in total disregard of the stated government policy amounts to violation of his right to be discriminated against on the ground of health, age and disability

3. A declaration that failure by the 1st and 2nd Respondent to recognise the petitioner as disabled person pursuant to the persons with Disabilities Act No. 14 of 2013 is a discrimination against the petitioners and a violation against his constitutional

Rights.

4. A declaration that being dully registered as person with disability he is entitled to serve until the age of 65 years

5. A declaration that the retirement notice dated 20th January, 2020 from the 1st Respondent and the letter dated 13th February 2020 declining the recommendation of the applicant to retire at the age of sixty-five (65) years are null and void

6. An order of permanent injunction restraining the respondent, whether by itself, its agents and/or servants or otherwise howsoever from retiring the claimant on attaining the age of 60 years

7. A declaration that the petitioner is entitled to payment of Kshs.4,932,420/- tabulated at Kshs.82,207/- per month being the amount in arrears he would have otherwise earned had his rights not been violated for five years until the retirement age of 65 years.

8. A declaration be made the petitioner be compensated a total sum of ten Million Kenya shillings or any other amount the court may deem appropriate by the respondent for violation of the petitioner's rights and fundamental freedoms under Article 27(4), (5), (6) and (7) of the constitution of Kenya and

Article 7 of the universal declaration of Human rights.

9. Costs of the petition

10. Interests on prayers (7), (8), and (7) at courts rate till payment in full.

The petition is grounded on the following;

The petitioner has been an employee of the 2nd Respondent and is currently attached to the 1st Respondent since 1984. He has risen through the ranks to the position of Principal Records Management officer.

The petitioner alleges to have been physically disabled since birth and is a certified person with disability. The government policy MSP/HRM/2/2/VOL.II(21) requires that persons with disability retire at the age of 65 years.

The petitioner was made aware that he was scheduled to retire on 1st October, 2020 when he attained the age of 60 vide the 1st Respondents letter dated 20th January, 2020.

The petitioner alleges he requested the 1st Respondent to extend his retirement age vide a letter dated 10th March, 2020 attaching all his medical documents confirming he is a person living with disability.

The petitioner contends that the Respondents failed to extend the petitioners retirement age which is a total disregard of the government's policy which amounts to violation of his rights not to be discriminated on the grounds of health, age and disability as enshrined in Article 27, 28 and 41(1) of the constitution and Article 7 of the Universal Declaration of Human Rights.

The petitioner is apprehensive that unless the orders sought are issued he will lose his source of livelihood and will suffer irreparable harm.

The petition is supported by the petitioner's affidavit sworn by Kinyua Felix on 21st September, 2020 in which he reiterates the averments set out in the petition.

1st Respondents case

The 1st respondent opposed the petition by way of a Replying Affidavit sworn by George N. Nyahoro on the 22nd October, 2020 who is the AG Deputy Director Human resource and Development in the Ministry of Education.

The affiant confirms that the petitioner has been in employment since 1984 and has risen up the ranks over time to the position of Principal Records Management Officer.

The affiant avers the Petitioner Vide PSC2 Form declared and signed that he did not suffer from any physical impairment. He further states that the medical reports, Kenya Revenue Exemption certificate and National Council for Persons with Disability Card was forwarded to the 2nd Respondent which declined the recommendation that the petitioner among others be allowed to retire at the age of 65 years on grounds of disability, which decision was conveyed to the petitioner on the 13th February, 2020.

The affiant also adds that the petitioner through a letter dated 30th March, 2020 submitted his retirement documents for processing which process was already finalized.

The affiant states that the petition is an afterthought and that its frivolous, vexatious and an abuse of court and prays that the same be dismissed with costs.

2nd Respondents case

The 2nd Respondent opposed the petition by way of a replying Affidavit sworn by Remmy Mulati Deputy Secretary Public Service Commission on 2nd October 2020. The affiant confirms that the government policy MPS/HRM/2/2/VOL. II Retirement age for public servants with disability is 65 years. And also stated that they can apply under section 35(1) of the Persons with Disability Act 2003 to be exempted from tax.

The affiant states that despite the petitioner indicating that he has had a disability since birth there is no document to support that and that the earliest document attached is a report from Medihill Hospital dated 10th Feb, 2018. He further states the petitioner got registered with the National Council for Persons with Disabilities on 8th March, 2019 and the medical examination and registration to the Council were done only one year prior to retirement.

The affiant states that for an officer's service to be extended to 65 years on grounds of disability he needs to have been registered with the Council and to have been registered in the public body human resource data base as a person with disability at least three years to the date of retirement. He must also possess a certificate of tax exception from Kenya Revenue Authority, which in the instant case the 2nd Respondent avers the petitioner does not have.

The affiant contends that since the applicant neither registered with the Council for Persons with Disability nor sought exemption from the Kenya Revenue Authority from 2003 it can only mean that whatever condition he may have, did not adversely affect his ability to carry out ordinary day to day activities.

He states that there is no justification for extension of service to 65 years and if any the Public Service regulations require that he ought to have been registered in the Human Resource database for at least three years from the date of retirement. He further prays that the petition and the Notice of motion be dismissed with costs.

Petitioners Re-joinder

The petitioner filed a further affidavit sworn on 30th October, 2020 in response to the Respondents replying Affidavits in which he contends that he applied for Tax exemption but never received any response from the 1st respondent. The affiant averred that there is no limitation on the period for enforcement and enjoyment of the right to retire at the age of 65 years being a person with disability.

Parties agreed to dispose the petition by way of written submissions.

Applicant's submissions

The petitioner submits that the government requires that persons with disability in public service retire at the age of 65 years as per the public service circular MSPS/HRM/2/2/VOL L.11(21) dated 29th May, 2012. The circular states that for a person to qualify for extension of retirement age he has to be a person with disability as defined in Section 2 of the persons with disability Act 2003.

The petitioner relied on the case of **Mary Kerubo Osoro v Public Service Commission (2017) eKLR** and the case of **Stephen Kariuki Kamau & 5 Others v Kenya Ports Authority and 6 Others** where the court stated as follows; -

“For purposes of determining whether any person is suffering from disability as defined in the Constitution and Persons with Disability Act Section 7(1)(c) of the Act provides for registration of persons with disability to determine whether any employee..... is subject to disability as so defined..... The effect of foregoing jurisprudence with which I fully associate myself with is that disability is defined in the Constitution and the Persons with Disabilities Act is a matter of clarification and registration by the National Council for Persons with Disabilities which itself relies on duly completed medical reports.”

The petitioner submits that he has a disability which adversely affects his social, economic and environmental participation as demonstrated in his medical reports. He further submits that he has registered with the National Council for Persons with Disabilities and as such states that he is entitled to the extension of his retirement age to 65 years.

The petitioner submits that the request for extension of retirement age was made on 28th March, 2019 and the decision by the 2nd respondent to decline the petitioners request was vide a letter dated 7th November, 2019 and was communicated to the petitioner on 13th February, 2020 therefore the decision was made before the aforementioned regulations were published on 28th January, 2020 The petitioner submits that the law does not apply retrospectively as such the Public Service Commission regulation should not be construed to retrospectively affect the petitioners substantive rights.

The petitioner outlined his rights that have been violated as follows: Article 27 of the Constitution, Section 5(3) of the Employment Act 2007, Section 15 of the persons with Disabilities Act 2003, Article 7 of the Universal Declaration of Human Rights, Article 28, 4(1) of the Constitution.

The petitioner submits that the respondents' actions declining to extend his retirement age to 65 years without justification is singling the petitioner out and denying him to enjoy the privileges and other benefits that accorded to other public servants of his age and living with disability which not only amounts to discrimination on basis of disability and age but also an unfair labour practice.

The petitioner relied on the case of **Reuben Njunguna Gachukia & Another v Inspector General of the National Police Service & 4 other (2019) eKLR** where the Court stated that:

“The petitioners sought damages for the violation of constitutional rights. Article 23(3) of the Constitution empowers this court to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. What amounts to ‘appropriate relief’ was discussed by the South African Constitutional Court in Minister of Health & Others vs. Treatment Action Campaign & Others (2002) 5 L.R.C 216 at page 249 as follows:

“...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if need be to achieve this goal...”

He further relied on the Court of Appeal decision in **Gitobu Imanyara & 2 Others v Attorney General (2016) eKLR** which outlined the relevant principles in awarding damages in constitutional violations as follows: -

“The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. Per Lord Nicholls at Paragraphs 18 & 19: When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of the compensation. But this measure is no more than a guide because the award all compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches...”

The petitioner submits that he has established that he was discriminated, was subjected to unfair labour practice and his right to human dignity was infringed. He prays that the orders sought be granted to vindicate the constitutional rights that have been infringed.

Respondents Submissions

The respondents in their submissions indicated that the petitioner did not respond to the averments by the 1st Respondent as such the evidence by the 1st respondent was un rebutted. In that the respondents relied on the case of **Caleb Onyango Andongo v Benard Ouma Ogur (2020) eKLR**.

The respondents submit that since the petitioner chose not to rebut to specific facts then he is deemed to have admitted that he has submitted his documents for processing of pension cannot be allowed to accept and at the same time reject that he is bound by the 60 year rule.

The respondents submit that registration by the National Council for persons with disability is not *prima facie* evidence of disability. He submits that the petitioner has not produced evidence that he was a person living with disability since birth and never registered as a person with disability until 1 year to retirement, and even after registration he never sought for tax exemption from KRA.

The respondents submit that just the mere fact that the petitioner is registered with persons with disability does not mean that the petitioner is a person with disability. They further submit that the petitioner has not cited any law that bars an employer from reviewing the conditions of employees registered as persons with disability to determine the extent of disability and make appropriate decisions.

The respondent submits that the petitioner's impairment does not impact on his social, economic and environmental participation in any way as he does not enjoy the privileges enjoyed by persons with disability such as tax exemption.

The respondents submit that the petitioner has failed to prove that their constitutional rights have been infringed. The respondent relied on the cases of **East Africa Portland Cement Company Ltd v Attorney General & Another (2013)** and **Jane Angalia Obando v TSC & 2 Others, ELRC Petition 4 of 2020**.

The respondents submit that the petitioners contract is not underpinned for breach thereof to be actioned by way of a constitutional petition. They submit that the suit is camouflaged as breach of the constitution yet the petitioner is citing the employment act and the government policy to the effect of persons with disability retire at the age of 65 years.

The respondents submit that the petitioner's order for compensation to the tune of Kshs.10 million is a blanket figure without the formula of how the same was reached.

He further submits that the petitioner is not entitled to payment of salaries from the age of 60 years to 65 years as they are not of right and Section 49 of the employment Act has not been invoked.

He relied on the Court of Appeal decisions in **Rift Valley Textiles Limited v Edward Onyango Oganda Civil Appeal No. 27 of 1992** and **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd (204) eKLR**.

The respondents submit that the petitioner having filled his retirement documents he is estopped from turning back and claiming he ought to work until the age of 65 years. They further submit that the policy on retirement until the age of 65 years does not override the applicable in the public service and the alleged breach of the policy cannot be elevated as the breach of the constitution, he submits that the petition be dismissed with costs.

Analysis and Determination

Issues for determination: -

a) Whether the petitioner was discriminated on the basis of disability?

Article 27(4) of the Constitution provides: -

The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion conscience, belief, culture, dress, language or birth.

For the petitioner to prove discrimination he must prove that he was treated differently from people in the same situation as himself. This he has not done in his pleadings or submissions. He has not proved that he was treated less favourably from other persons in similar circumstances. I find that there is no proof of discrimination.

b) Whether the petitioner is entitled to retire at the age of 65 years

Under the **Persons with Disability Act of 2003**, disability is defined

as follows;

A physical sensory, mental or other impairment including any visual, hearing, learning or physical incapacity which impacts adversely on social economic or environmental participation. once a person has been certified to be with disability he qualifies to be registered in accordance with Section 7(1)(c) of the Act.

Regulations 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.

The respondents have raised several issues about the application by the Petitioner to retire at age 65. The first is the time when the petitioner registered with the Council for Persons with Disabilities being one year to his retirement. The respondents do not dispute the fact that the petitioner was certified by Midhill Hospital to be a person with disability and later registered with the National Council for Persons with Disability. They contend that he does not fit within the requirements of Regulation 70.

The respondents further raise the issue that despite the averments by the petitioner to have been disabled since birth the earliest medical examination document availed from Midhill Hospital is dated 10th February, 2018 and the petitioner was registered with the National Council of Persons with Disabilities on 18th March 2019 which was only one year before his date of retirement.

The Respondents further question why, if the Petitioner alleges to have been living with a disability since birth, in his employment records he expressly stated that he did not suffer from any physical impairment.

The Petitioner has not explained the reasons why, if he was living with a disability since birth, he did not disclose the disability in his Application for Employment Form PSC2. In fact, in response to the question “do you suffer from any physical impairment” he responded “NO”. Under “Give details if any” he responded “N/A” meaning not applicable.

The Petitioner further did not explain why from 2003 when the National Council for Persons with Disabilities was established he did not seek to be registered for or seek exemption from KRA until 2019, just one year to his retirement.

It is clear from Regulation 70 that the Petitioner does not meet the requirements for enactment to retire at the age of 65 years on account of disability because he was not registered at least 3 years before the date of his application. The Petitioner has further not demonstrated that his disability is of a permanent nature that can be perceived by significant sectors of the community or that the disability has a substantial impact on his ability to carry out ordinary day to day activities as provide in Regulation 70(2)(a) of the Public Service Regulations, 2020.

The Petitioner has submitted that the Regulations do not apply to him as his request for extension of retirement age was made on 28th March 2019 and declined by letter dated 7th November 2019, but communicated to the Petitioner by letter dated 13th February 2020.

Even if this were the case the Petitioner would still not be entitled to the orders sought she did not explain why he not apply earlier if indeed he suffers from the alleged disability since birth. He further did not explain why did not disclose this fact at the time of recruitment.

I further find that from the medical report submitted by the claimant, he does not fit not the definition of disability for pursues of extension for retirement age based on the definition of Disability in the Persons with Disability Act which is defined as a disability that impacts adversely on the social economic and environmental participation of the person. According to the medical report from

MidHill Hospital, all the Petitioner suffers from is a limp.

For the foregoing reasons, I agree with the Respondents that the Petitioner is estopped from claiming that he suffers from disability since birth. I find no basis for granting the orders sought in the petition with the result that the petition is dismissed.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF FEBRUARY 2021

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 has 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