



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E006 OF 2020

IN THE MATTER OF: ENFORCEMENT OF THE FUNDAMENTAL RIGHTS

AND FREEDOMS AND CONSTITUTIONAL VALUES AND PRINCIPLES

AND

IN THE MATTER OF: ARTICLES 1, 2, 10, 21, 22, 27, 28, 41, 47, 50(1),

54, 232 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 11, 12(2) AND 15 OF

THE PERSONS WITH DISABILITIES ACT, 2003, SECTION 5 OF THE EMPLOYMENT ACT,

SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT AND OTHER

ENABLING PROVISIONS OF THE LAW

BETWEEN

GODFREY ODEVERO NAKHAYO.....PETITIONER

v

COUNCIL, UNIVERSITY OF KABIANGA.....1st RESPONDENT

VICE-CHANCELLOR, UNIVERSITY OF KABIANGA.....2nd RESPONDENT

JUDGMENT

1. Godfrey Odebero Nakhayo (the Petitioner) was employed as an Assistant Accountant on or around 22 December 2009 by Kabianga University College (then) a constituent college of Moi University (the Respondents).
2. In 2013, the Petitioner developed a cataract, forcing him to seek medical assistance. He became blind on the left eye, and this affected his work.
3. On 13 August 2019, the Petitioner was registered with and obtained a National Council for Persons with Disabilities Card.
4. With the registration, the Petitioner wrote to the Respondents on 15 August 2019 requesting for a monthly disability allowance in terms of the Persons with Disabilities Act, 2003. The Petitioner attached supporting documentation to the request, and these included medical reports and assessment approved by the Director of Medical Services.
5. Upon receipt of the request, the Assistant Registrar, Human Resources wrote a Memo to the Finance Officer on 16 August 2019

instructing him to commence the payment of a monthly disability allowance to the Petitioner at the rate of Kshs 15,000/- and the same was effected with the August 2019 salary (the Respondents paid the Petitioner the allowance until September 2020).

6. In the meantime, the Respondents wrote to the National Council for Persons with Disabilities on 19 August 2019 seeking (any) assistance to be extended to the Petitioner.

7. On 1 November 2019, the Kenya Revenue Authority issued the Petitioner with a certificate of Income Tax Exemption for the period 1 October 2019 to 30 September 2024.

8. When the Respondents stopped the allowance in September 2020, the Petitioner was distressed, and he sought legal advice. On 7 October 2020, his advocates wrote a formal demand to the Respondents to reinstate the payments.

9. On 14 October 2020, the Respondents replied to the demand indicating that the Petitioner did not qualify for the disability allowance because he *did not have a personal guide/assistant assisting him to perform his duties*.

10. The Petitioner then moved the Court on 6 November 2020 alleging violation of his rights.

11. The Petitioner sought the following orders:

(i) A declaration that the Petitioner's rights as guaranteed and protected under the Constitution of Kenya 2010 in Articles 10, 21, 22, 27, 28, 41, 47, 50(1), 54 and 232 have been violated by the Respondents.

(ii) An order of certiorari to remove into this Honourable Court the decision of the Respondents stopping the payment of the disability allowance to the Petitioner for the purposes of its being quashed and for the decision to be quashed upon such removal.

(iii) An order of mandamus to issue compelling the Respondents to pay the Petitioner the disability allowance from the month of September 2020 and further periodically on a monthly basis until the Petitioner's retirement or termination of the Petitioner's employment with the Respondents, whichever is earlier.

(iv) A declaration that the Petitioner's retirement age is 65 years as a person living with a disability.

(v) General, exemplary and punitive damages at Court apportioned rate towards undignified treatment, unwarranted emotional, physical and mental destabilisation of the Petitioner and aimed at deterring any such future malicious illegalities by the Respondents and the cadre.

(vi) Costs of the Petition be borne by the Respondents and the cadre.

(vii) Such other orders as this Honourable Court shall deem just.

12. Filed at the same time was a Motion under a certificate of urgency seeking payment of arrears of the allowance and continued payment until the determination of the Petition.

13. On 18 November 2020, the Court directed that the Motion and Petition would be taken together. The parties were directed to file and exchange affidavits and submissions.

14. The Respondents filed a Replying Affidavit sworn by the Vice-Chancellor in opposition to the Petition on 30 November 2020, and this prompted the Petitioner to file a supplementary affidavit on 21 December 2020.

15. The Petitioner filed his submissions on 21 December 2020 (should have been filed and served by 18 December 2020) while the Respondents filed their submissions on 8 January 2021.

16. The Court has considered the Petition, Motion, affidavits and submissions.

Entitlement to disability allowance

17. Part III of the Persons with Disabilities Act sets out the Rights and Privileges of persons living with a disability, while Part VI outlines reliefs and incentives.

18. These include exemption from income tax and import duty on vehicles designed for use by the person with the disability.

19. The Act does not expressly provide for a disability allowance.

20. However, pursuant to its Constitutional mandate under Article 230(4)(b) of the Constitution, the Salaries and Remuneration Commission issued a Circular (Review) on 26 August 2019 in respect to persons living with disabilities.

21. According to the Circular, persons living with disabilities (deaf, blind and physically disabled) are entitled to a flat-rate monthly allowance of Kshs 20,000/- for purposes of engaging a personal guide.

22. And to be eligible for the allowance, the person should be registered with the National Council for Persons living with Disabilities. It is not in dispute that the Petitioner is registered with the Council.
23. In discontinuing the allowance, the Respondents made several contentions.
24. It was first asserted that the allowance was only payable in cases where the person living with a disability has a personal guide.
25. Secondly, the Respondent took the view that its decision was lawful because the Petitioner's terms and conditions of service did not provide for payment of a disability allowance.
26. In taking the position, the Respondents were relying on the part of the Circular, which provides:
- 3.The public officers living with disability must be registered with the National Council for Persons with Disability (NCPWD). Accounting Officers/Authorised Officers shall determine eligibility of employees for each type of disability as advised in Table 1 above.
- 4.The Accounting Officers/Authorised Officers shall provide personal guides with transport facilitation as per prevailing government policy whenever accompanying the beneficiary. In the case of travelling via air or rail, the employer to provide economy class tickets for personal guides.
27. The Court has looked keenly at the two clauses and come to the view that they are to be read conjunctively.
28. Condition 3 provides for the eligibility for payment of a personal guide allowance for public officers living with a disability upon proof of registration with the National Council for Persons with Disabilities.
29. In the view of the Court, if the public officer satisfies the condition of registration, and demonstrates that he or she has a personal guide, then the public officer becomes entitled to the payment of the personal guide allowance. The payment would obviate the need of the public body/employer from placing the personal guide on the payroll.
30. Condition 4, in the view of the Court, requires the Accounting Officer to separately facilitate the personal guide of a person with a disability whenever accompanying the public officer on official business outside the normal place of work.
31. On the contention that the Respondents policies did not provide for payment of a disability allowance, the Court is of the view that that may be so, but the text, tenor and spirit of the Persons with Disabilities Act suggests otherwise. Just as an illustration, section 15(1)(f) of the Act outlaws discrimination in the provision of facilities related to and connected to employment.
32. The provision envisages reasonable accommodation of the person with a disability.
33. The Petitioner herein is completely blind and has serious challenges driving (the deposition was not challenged or rebutted), and he uses a driver who qualifies to be a personal guide (details were disclosed).
34. Lastly, under section 31 of the Traffic Act, it is worth noting that physical disability may disentitle the Petitioner from driving himself as he may pose a danger not only to himself and other road users.
35. The Petitioner, in the view of the Court has satisfied the eligibility criteria for the personal guide allowance.

Retirement at 65 years

36. In the view of the Court, the question of the Petitioner's retirement age does not arise because the Respondents had not threatened or indicated that they were in the process of retiring him.

Conclusion and Orders

37. From the foregoing, the Court finds and orders:

(i) A declaration be and is hereby issued that the Petitioner is an eligible public officer for the payment of a personal guide allowance in terms of the Circular dated 26 August 2019 from the Salaries and Remuneration Commission referenced Remuneration for a Personal Guide for Public Officers living with a Disability.

(ii) An order of mandamus be and is hereby issued compelling the Respondents to pay the Petitioner a personal guide allowance from the month of September 2020 and further periodically on a monthly basis until the Petitioner's retirement or termination of the Petitioner's employment with the Respondents, whichever is earlier.

38. The Petitioner and the Respondents are still in an on-going contractual relationship. The Petitioner did not prove any malice or bad faith on the part of the Respondents. The dispute revolved around an interpretation of a term and condition of employment.

39. All other reliefs are therefore declined. Each party to bear its own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 17th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Omondi, Abande & Co. Advocates

For Respondents Robai Ayuma Wakoli, Advocate/Legal Officer

Court Assistant Chrispo Aura