



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**PETITION 93 OF 2017**

**JONATHAN ABRAHAM KIPKIRUI CHELULE.....CLAIMANT**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PENSIONS.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. By a petition dated 15th November, 2016 the petitioner averred among others that:

i. *On or about 5<sup>th</sup> May 2004, the then Commissioner of Police convened a press conference whereas he unlawfully, unilaterally, unprocedurally announced to the electronic and print media that Thirty Seven (37) gazzeted Police Officers including the Petitioner had been retired.*

ii. *On or about 6<sup>th</sup> May 2004 it was reported in the Daily Nation Newspaper that the reorganization was driven by the desire to promote, discipline, efficiency and inculcate professional work ethics in the police, measures that will translate into quality service delivery.*

iii. *The Petitioner learnt of his purported retirement through the electronic media on 5<sup>th</sup> May 2004.*

iv. *The Petitioner alongside other affected Officers filed a Miscellaneous Civil Application Case Nos. 1457 of 2005, 1492 of 2004 and 1365 of 2004 challenging the Constitutionality and legality of the purported decision to retire the officers.*

v. *The Honorable Court gave a judgment on 23<sup>rd</sup> July 2012 in which the Court held that the Public Service Commission had violated and breached fundamental right to natural justice and granted orders of Certiorari quashing the decision of the then Commissioner of Police. This therefore meant that the Petitioner and other Officers were to continue serving their various capacities.*

vi. *Prior to the delivery of the final judgment, Justice M.K Ibrahim gave orders on 13<sup>th</sup> October 2004 that the Petitioners were to remain in sservice pending hearing and determination of Judicial Review Applications.*

vii. *At the time of reinstatement order the Petitioner was 59 years old and was expected to retire at 60 years old.*

viii. *In order to circumvent the decision of the Honourable Court the 1<sup>st</sup> respondent unconstitutionally and unlawfully backdated the Petitioners retirement to 55 years.*

ix. *The action of the First Respondent's contravened the Petitioner right to fair administrative action.*

x. *The Petitioner should have been given the right to be allowed to work until he attained 60 years and be paid all the salary arrears from the time of purported retirement upto the age of 60 years.*

xi. The Petitioners Pension ought to have been calculated from the time he attained the age of 60 years as is provided by law.

xii. The First Respondent's action of purporting to back date the Petitioner's retirement denied him his salary arrears from the date he was purported to have been retired 5<sup>th</sup> May 2004 to the date of judgment 23<sup>rd</sup> July 2012 a period of 71 months.

xiii. The Petitioner's lump sum pension ought to have been calculated at the time he attained the age of 60 years and not 55 years as done by the Respondents.

2. The 1<sup>st</sup> respondent files a replying affidavit through one Maxwell Agoro who deponed on the main that:

i. That the Inspector General does not employ nor retire officers, that the function of employing, retirement and any other human resource management of officers working in the Inspector General is a function of the National Police Service Commission (herein after referred to as NPSC) under Article of the Constitution, the 1<sup>st</sup> Respondent herein.

ii. That the Inspector General only effects the decision of the National Police Service Commission as when communicated.

iii. That the petitioner was retired on the 5<sup>th</sup> May, 2004 by the public Service Commission on grounds of Re-Organization of Government through their letter Ref PSC 3/37/9 dated 5<sup>th</sup> May, 2004.

iv. That the petitioner upon successfully challenging the decision was reinstated and retired with effect from 3<sup>rd</sup> September, 2008 as at that date he had attained the age of 55 years.

v. That the decision to retire the officer upon attaining 55 years as opposed to 60 years was informed by the fact that there was a circular issued of Ref.OP.CAD. 2/74 dated 20<sup>th</sup> March, 2009 which extended the mandatory retirement age to 60 years with effect from 1<sup>st</sup> April, 2009 and the petitioner had already attained 55 years on 3<sup>rd</sup> September, 2008, therefore the petitioner is not in a position to be a beneficiary of the same.

vi. That according to the petitioner's birth certificate, he was born on 3<sup>rd</sup> September, 1953 and as such he would have retired in the year 2008 having attained the age of fifty five (55) years.

vii. That prior to the issuance of the Circular Ref. OP.CAD. 2/74 dated 20<sup>th</sup> March, 2009, the retirement of civil servants was fifty five (55) years.

viii. That it is not true that the Police Service is in defiance of the Court decision of JR. Misc Cause No. 1365 of 2004, Julius Odol Noberts & Others Vs Public Service Commission & 2 Others.

ix. That while implementing the Circular Ref. OP.CAD. 2/7A of 20<sup>th</sup> March, 2009, the National Police Service Commission, 1<sup>st</sup> Respondent herein held that officers who had attained the retirement age of fifty five (55) years as the petitioner herein, be reinstated and be retired as the time they attained the age of fifty five (55) years.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent further filed grounds of opposition in which they contended among others that:

i. That there are no constitutional issues raised for the court to determine.

ii. That the petition does not raise any violation of the petitioner fundamental rights and freedoms by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

iii. That the instant petition lacks precision pursuant to the provisions of Rule 4 of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Rules; **Annarita Karimi Njeru Vs Rep 1979 KLR 154 & the case of James Muchene Ngei Vs Republic [2008] eKLR H. C at Nairobi Misc Application No 562 of 2008**, where it was held that if a person is seeking redress from the High Court or an order which invokes a reference to the constitution, it is important, if only to ensure that justice is done in his case, that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.

iv. That the petitioner has failed to specifically invoke any Article under the constitution that he was relying on. The constitution has several provisions which leaves room for speculation a matter which petitioners are taking advantage of by asking the court to help them determine what aspect of rights that has been specifically violated and or prone to violation; in the case of **Cyprian Kubai Vs Stanley Kaiyongi Mwenda 2002 eKLR H.C at Nairobi, Misc App No. 612 of 2002**.

v. That the retirement of the petitioner was in accordance with the law and that due process of the laws was followed.

4. In submissions in support of the petition, Mr Bosek for the petitioner submitted on the main that the suit arose out of the action of the Commissioner of Police to unlawfully and unprocedurally retire the petitioners without notice or information. The action came to the knowledge of petitioner through an announcement on print media. This move prompted the petitioner and a number of effected officers to file Misc application No 1457 of 2005, 1492 of 2004 and 1365 of 2004 and Hon Ibrahim J (as he then was) ruled in favour of the applicant

and his colleagues. The court stated in its ruling that: *“For avoidance of doubt this strictly means the applicants are deemed still to be in service of the Public Service Commission and the Police”.*

5. The import of the above ruling, counsel submitted, was that the applicant remained in service throughout the pendency of the proceeding until the delivery of the judgement on 23rd April, 2012. Counsel therefore urged the court to find that the petitioners employment for purposes of computation of salaries, other benefits and retirement pension included the period when the court case was pending awaiting hearing and determination.

6. On the issue of constitutional questions counsel submitted that the constitution provides that the bill of rights belong to every individual and are not granted by the state. According to counsel the dignity of the petitioner was totally disregarded when the Commissioner of Police chose to publish his retirement in the newspaper and through a press conference without having been given any notice whatsoever. Second, the petitioner according to counsel was discriminated against when his retirement age was backdated and done before 60 years. Counsel further contended that the reason given for the retirement could be interpreted to mean the petitioner was not abiding by the professional ethics and that he was not effective and productive in his work.

7. Ms Wangechi and Mercy Irari for the respondents submitted that the respondents have not in anyway infringed the rights of the petitioner and that his retirement was based on the provision of the law. Counsel further submitted that 2nd and 3rd respondents had been wrongly sued since they had no role regarding the employment and retirement of the petitioner and should not have been enjoined as respondent but rather as interested party.

8. Counsel further submitted that the court lacked jurisdiction since the issue was not a constitutional issue but purely an employment issue and that the jurisdiction of the court to deal with employment and labour matters is conferred by the constitution and the statute creating the court. According to counsel, the petition does not raise any question meriting a claim of human rights and fundamentals freedoms and further that the petition was overtaken by events given that the retirement was effected back in 2008.

9. Counsel further submitted that the 1st respondent was only implementing a government circular requiring departments addressed therein not to retain in service officers beyond the mandatory retirement age. Counsel further submitted that the petitioner challenged the decision to retire him and the court upheld the certiorari and he was reinstated and later retired with effect from 3rd September, 2008 when he attained 55 years of age.

10. As observed above, the petitioner together with others were purportedly retired by the 1st respondent under circumstances they considered unprocedural and unfair. They moved the court on 13th October, 2004 for Judicial Review orders and the court (Ibrahim J) granted an order of certiorari and directed them to be reinstated to work pending the hearing and determination of the Judicial Review application. The Judicial Review application was heard by Justice W. K. Korir who gave his ruling on 26th September, 2013. The petitioner in the meantime was retired on 3rd September, 2008 when he attained the mandatory retirement age then of 55 years.

11. The petitioner contended that he ought not to have retired before the hearing and conclusion of his Judicial Review application. That is to say he should have retired after the 26th September, 2014. The petitioner further contended that during the pendency of his case the mandatory retirement age was extended to 60 years hence if he was to retire at all, it should have been at age 60 and not 55 years.

12. The court has carefully considered submissions by counsel for the petitioner in support of the petition as well as response by the respondent s counsel and does not think the submission by counsel for the petitioner is right on point of law. The gravamen of the Judicial Review application was the decision to retire the petitioner prematurely and unprocedurally. It however did not change the mandatory retirement age for public servants as would have applied to the petitioner. Any other interpretation would yield absurd results and create a wrong impression that a public servant with pending litigation over his or her retirement age would by virtue of the suit blow open the mandatory retirement age as applies to him or her. It is the courts view that by the time my brother Justice W.K. Korir decided the substantive application it had lost substratum since the petitioner had mandatorily retired upon attainment of 55 years on 3rd September, 2008.

13. The unprocedural removal of the petitioner from service which was set aside by then Ibrahim J and confirmed by Korir J remain in force and the petitioner would be entitled to all salary and benefits including pension upto the mandatory retirement age of 55 years obtaining as at 3rd September, 2008 when he retired.

14. In conclusion the petition is found without merits and is hereby dismissed with no order as to costs.

15. It is ordered.

Dated at Nairobi this 25<sup>th</sup> day of January, 2019

**Abuodha Jorum Nelson**

**Judge**

Delivered this 25<sup>th</sup> day of January, 2019

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.