Republic v Judicial Service Commission & 2 others; Githinji (Exparte) (Judicial Review Application 8 of 2019) [2019] KEELRC 1286 (KLR) (28 June 2019) (Judgment)

Republic v Judicial Service Commissions & 2 others Exparte Erastus M Githinji [2019] eKLR

Neutral citation: [2019] KEELRC 1286 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW APPLICATION 8 OF 2019

B ONGAYA, J

JUNE 28, 2019

BETWEEN

THE REPUBLIC .... APPLICANT

AND

JUDICIAL SERVICE COMMISSION .... 1ST RESPONDENT

THE CHIEF REGISTRAR OF THE JUDICIARY .... 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL .... 3RD RESPONDENT

AND

HON JUSTICE ERASTUS M GITHINJI .... EXPARTE

Government circular prescribing and imposing on civil servants ultra vires and unlawful procedural step when applying for birth certificates nullified.

Article 236 (b) of the Constitution provided that a public officer ought not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The decision to retire the applicant prematurely amounted to an adverse action or punishment without according the applicant due process of justice as was known in rules of natural justice.

Reported by Chelimo Eunice

Judicial Review *-judicial review proceedings - scope of judicial review proceedings - whether judicial review proceedings were only limited to matters of procedure or aspects of merit could also be reviewed - where the applicant had alleged unreasonableness and illegality of an impugned decision - what issues invited review on merit - what was the scope and mandate of a reviewing court - whether a reviewing court would substitute its own decision for that of the administrator – Constitution of Kenya, 2010, article 47; Fair Administrative Action Act, sections 7 & 11.*

Evidence Law *- admissible evidence - public document – proof of public documents – presumption as to documents – circumstances which a court would presume a document to be genuine - whether a certificate of birth issued by a public officer would be presumed genuine and thus admissible in evidence – Evidence Act, sections 82 & 83.*

Statutes *– interpretation of statutes – Births and Deaths Registration Act - interpretation of section 26 of the Births and Deaths Registration Act on the procedure for acquiring a birth certificate – whether one had to apply for a birth certificate through the Permanent Secretary or Head of Department- validity of Government Circular which required application of birth certificate through the Permanent Secretary or Head of Department – whether the said Circular applied to registration of births by persons who were not civil servants- Births and Deaths Registration Act, section 26.*

Constitutional Law *– constitutional commissions – Judicial Service Commission – functions of the Judicial Service Commission - whether judicial officer's retirement age was a term and condition of service which fell for review by the Judicial Service Commission – whether the Judicial Service Commission was mandated to hear or consider judicial officer's case in regard to retirement age and whether it was bound by rules of natural justice – Constitution of Kenya, 2010, articles 47, 171, 172 & 236(2); Fair Administrative Action Act, section 4.*

Brief facts

The applicant challenged the 1st and 2nd respondents' decision to retire him from employment as a judge of the Court of Appeal and sought an order prohibiting the respondents from acting on or implementing government policy directions in making their decision to retire him. The applicant stated that when applying for employment as a Second Class Magistrate in the Judicial Service Commission (JSC), he indicated in the application form (PSC form) that his date of birth was 1949. Subsequently, in accordance with provisions of the Births and Deaths Registration Act, he applied and obtained birth certificate on October 29, 1999, showing that he was born on December 30, 1949. Since then, his official date of birth had been honoured as being December 30, 1949 and that the date had never been questioned.

By the notice of retirement dated October 30, 2018, the 2nd respondent conveyed to the applicant that the records held by the judiciary indicated that he would attain the mandatory retirement age of 70 years on June 01, 2019 and therefore he was being notified that he would retire with effect from June 01, 2019. The 2nd respondent argued that government policy stipulated that where an officer indicated only the year of birth on PSC form, he/she was deemed to have been born on July 1, of that year.

Issues

i. Whether judicial review proceedings were only limited to matters of procedure or aspects of merit would also be reviewed.
ii. Whether Government Circular Ref. No. DPM 7/7/43A Vol. IV/ (125) (as amended by Circular Ref. No. DPM PA/5/7 VOL. LII/ (170)) which required application of birth certificate through the Permanent Secretary or Head of Department was valid and whether it applied to registration of births of persons who were not civil servants.
iii. Whether a judicial officer's retirement age was a term and condition of service which fell for review by the Judicial Service Commission.
iv. What was the role of Judicial Service Commission in computing retirement age for judicial officers when age was disputed?

Held

1. On account of consideration of proportionality and unreasonableness of a decision in issue, analysis of article 47 of the Constitution, as read with the provisions of the Fair Administrative Action Act (the Act) revealed the implicit shift of judicial review to include aspects of merit review of administrative action. Whether relevant considerations were taken into account in making the impugned decision invited aspects of merit review.
2. The grounds for review in section 7(2)(i) of the Act that required consideration of whether the administrative action was authorized by the empowering provision or not connected with the purpose

for which it was taken and the evaluation of the reasons given for the decision, implicitly required assessment of facts and to that extent merits of the decision. Even if the merits of the decision was undertaken pursuant to the grounds in section 7 (2) of the Act, the reviewing court had no mandate to substitute its own decision for that of the administrator. Courts could only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On case by case basis, future judicial decisions ought to delineate the extent of merit review under the provisions of the Act. Courts would consider all cases where illegality was alleged both in matters of substance and procedure.

3. Since the applicant had alleged unreasonableness and illegality, an analysis of the decision was necessary to make a finding on the allegations one way or the other. In such circumstances, a review on merits was necessary. Review on merits was increasingly permissible towards determining the reasonableness or legality of an impugned decision so that an application seeking a review on merits would not fail on that account alone.

4. Whereas the applicant signed the PSC form when applying to join the judiciary as a Second Class Magistrate, over time, Kenya became more and more sophisticated and the applicant was serving in the judiciary, an arm of government as opposed to an agency, ministry or department of the executive arm that the circulars applied to. The circular of November 15, 1982 was clear that it applied to registration of births by civil servants. The applicant served in the judiciary and he was not serving in the civil service, he was not a civil servant. Thus, the circular of November 15, 1982 as amended did not apply to the claimant as a magistrate and then later as a judge. He was not a civil servant throughout his service in the judiciary.

5. In any event, the circulars were merely administrative policies and they could not override the clear provisions of the relevant and applicable statute. Section 26(3) of the Births and Deaths Registration Act mandated the Principal Registrar, on payment of the prescribed fee, to furnish a certificate in the prescribed form, of the birth of any person compiled in the prescribed manner from the records and registers in his custody. Section 26 (4) of the Births and Deaths Registration Act provided that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar should be received as evidence of the dates and facts therein contained without any other proof of such entry.

6. Further, section 83 (1) of the Evidence Act made it clear that courts would presume to be genuine every document declared by law to be admissible as evidence of any particular fact, substantially in the form, and purporting to be excluded in the manner, directed by law in that behalf and purporting to be duly certified by a public officer. As stipulated in section 83(2) of the Evidence Act, courts would presume that any officer by whom any such document purported to be signed or certified, held when he signed it, the official character which he claimed in such document.

7. The applicant's birth certificate was presumed to be the true evidence of the dates and other facts it declared and the officer who issued the certificate had the authority to issue it and he issued the certificate relying on the entries in the register and such useful and relevant information. The circular was *ultra vires* in prescribing a step in acquiring the birth certificate, namely applying through the Permanent Secretary or Head of Department but which was never provided for or contemplated under the Births and Deaths Registration Act. It was equally *ultra vires* and offensive of the principle of legality for the respondents to require the petitioner to have complied with such *ultra vires* procedural step when he applied for his certificate of birth. Besides not being notified about that procedure in the circular for applying for the birth certificate, it was unnecessary and unlawful to bind the applicant to such *ultra vires* policy that was inconsistent with the statutory provisions on the procedure for applying for the birth certificate.

8. The circulars did not bind and apply to the applicant's service and further, they prescribed and imposed on civil servants an *ultra vires* and therefore unlawful procedural step in applying for a birth certificate.

9. The declared date was not inconsistent with the year of birth as initially declared. Further, the applicant was appointed Ag. Puisne Judge in May 1987 and Judge of Appeal in June 2003. The on-line personal details maintained by the 1st and 2nd respondents showed the applicant's date of birth as December 30, 1949. The data was one instance the applicant notified the 1st and 2nd respondents about the date of birth. Further, on December 22, 2011, the applicant notified the same date of birth by completing the vetting questionnaire issued by the Judges and Magistrates Vetting Board. The applicant had consistently completed the declarations of incomes, assets and liabilities as required under the Public Officer Ethics Act. The 1st and 2nd respondents did not deny receiving such applicant's declarations. As required by section 28(1) of the Births and Deaths Registration Act, the 1st and 2nd respondents had not shown that they ever asked the applicant to make a clarification about his date of birth. It would be unjustified and unfair for the respondents to shift their statutory obligation and make it the applicant's burden.
10. In the instances narrated, the applicant clearly notified about his date of birth and the 1st and 2nd respondents made no dispute or demanded a clarification in that regard.
11. The policies as relied upon by the 1st and 2nd respondents applied to civil service and not the judicial service and, in any event, the policies as relied on were *ultra vires* the clear provisions of the Births and Deaths Registration Act and the Evidence Act and therefore null and void *ab initio*.
12. In view of the returned *ultra vires* policy, it was appropriate to enhance the safeguards for implementation or administration of the Births and Deaths Registration Act and if any deficiencies had been observed in the implementation or administration of the said Act, but which were not highlighted to the court at all in the instant case, then the appropriate legislative interventions would be available to the respondents towards achieving the desired outcomes.
13. It was unreasonable and illegitimate for the 1st and 2nd respondents to fail to reckon the applicant's date of birth as December 30, 1949 in view of the cited provisions of the Evidence Act, the Births and Deaths Registration Act, the Public Officer Ethics Act and as read with article 47 of the Constitution and the Fair Administrative Action Act. In particular, the 1st and 2nd respondents did not give him lawful reasons for the imposition of the retirement date as July 1, 2019 and as envisaged in article 47 (1) and (2) of the Constitution.
14. Article 167 (1) of the Constitution provided that a judge would retire from office on attaining the age of 70 years but would elect to retire at any time after attaining the age of 65 years. Further, article 259 (5) (c) of the Constitution provided that in computing time, if time was expressed as years, the period of time ended at the beginning of the date of the relevant year that corresponded to the date on which the period began. Thus, the applicant's date of birth was on December 30, 1949 and he would attain 70 years of age on December 30, 2019 and not on July 1, 2019. The date of retirement as imposed to be July 1, 2019 was unreasonable and illegitimate.
15. The procedure for terminating the applicant's service was unfair and the applicant was entitled to submit that the rules of natural justice had been breached. Article 236 (b) of the Constitution provided that a public officer ought not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The decision to retire the applicant prematurely amounted to an adverse action or punishment without according the applicant due process of justice as was known in rules of natural justice.
16. The 1st respondent was established under article 171 of the Constitution and in article 172 (b) of the Constitution, one of its functions was to review and make recommendations on the conditions of service of judges and judicial officers other than their remuneration. The retirement age was a term and condition of service and once the applicant disputed his effective date of retirement his case properly fell due for review by the 1st respondent and for making of an appropriate recommendation as per article 172(b) of the Constitution, and if the decision, the review and recommendation, was adverse, then the applicant was entitled to due process in arriving at the decision. There was no evidence that the

applicant's case had been reviewed by the 1st respondent and recommendations made in that regard. Thus, the applicant was entitled to urge that despite the dispute he had raised, an adverse decision had been made against him without his being accorded due process as was well known as rules of natural justice. Section 4 of the Fair Administrative Action Act as read with articles 47 and 236(2) of the Constitution, required the 1st respondent to hear or consider the applicant's case in that regard.

17. The applicant had established his case against the respondents and the remedies as prayed for were justified. There was no material before the court to suggest that there was an established bar to granting of any of the prayers as sought by the applicant, thus, the prayers were granted accordingly.

Application allowed.

Orders

i. *Judicial review order of certiorari issued quashing the decision of the 1st and 2nd respondents to retire the applicant from employment as communicated in the retirement notice through a letter dated the October 30, 2018 and another one dated January 28, 2019 (both Ref. CRJ 3/1) from the 2nd respondent to the applicant.*

ii. *Judicial review order of mandamus issued compelling the 1st respondent, the Chief Registrar of the Judiciary and other relevant authorities including the 2nd and 3rd respondents to give effect to the applicant's certificate of birth No. 648XXX dated October 29, 1999 certifying that the applicant was born on the December 30, 1949.*

iii. *Judicial review order of prohibition issued barring the respondents from acting on or implementing the government policy directions dated November 15, 1982; November 28, 1990; September 25, 2008 and October 14, 2013 in making their decision to retire the applicant.*

iv. *The 1st and 2nd respondents ordered to jointly or severally pay the applicant's costs of the leave stage and substantive proceedings.*

Citations

Statutes

None referred to

Advocates

Macharia Kahonge & Company Advocates
Isaac J.M. Wamaasa
Emmanuel Bitta, Deputy Chief State Counsel

JUDGMENT

1. The applicant is the Honourable Justice Erastus M. Githinji currently serving as a Judge of the Court of Appeal of the Republic of Kenya. The applicant filed a notice of motion on 16.04.2019 for judicial review orders and pursuant to leave granted by the Court on 11.04.2019. The application was filed through Macharia Kahonge & Company Advocates and brought under Order 53 rule 3, the Civil Procedure Rules, 2010, section 8 and 9 of the Law Reform Act (Cap. 26) and all other enabling powers and provisions of law. The applicant prayed for:

    a) An order of certiorari do issue to quash the decision of the 1st and 2nd respondents to retire the applicant from employment as communicated in the retirement notice through a letter dated the 30.10.2018 and another one dated 28.01.2019 (both Ref. CRJ 3/1) from the 2nd respondent to the applicant.

    b) An order of mandamus do issue to compel the 1st respondent, the Chief Registrar of the Judiciary and other relevant authorities including the 2nd and 3rd respondents to give effect to

the applicant's certificate of birth No. 648XXX dated 29.10.1999 certifying that the applicant was born on the 30.12.1949.

c) An order of prohibition do issue directly to the respondents jointly and severally barring them from acting on or implementing the Government policy directions dated 15.11.1982; 28.11.1990; 25.09.2008; and 14.10.2013 in making their decision to retire the applicant herein.

2. The applicant's case is based on the grounds in the application, the applicant's verifying affidavit and exhibits attached and the statement filed pursuant to Order 53, Rule 1(2) of the Civil Procedure Rules.

3. The parties were given an opportunity to compromise the dispute but they failed to do so and the Court proceeded to determine the application.

4. The applicant applied for employment as a Second Class Magistrate in the Judicial Service Commission by completing on 11.04.1975 the standard form for application for employment as issued by the Public Service Commission of Kenya. The applicant indicated in that application that his date of birth was 1949.

5. The applicant's case is that sometimes in 1999 a need arose for him to indicate his exact date of birth when he was applying for a passport and he therefore applied for a certificate of birth and on 29.10.1999 the birth certificate C.No.648XXX was issued to him showing that his date of birth was 30.12.1949. The applicant was then issued with passport No.D006XXX under immigration file No.853XXX. The passport showed that the applicant's date of birth was 30.12.1949. The applicant's case is that at all material time he was not notified that late registration of birth had to be made through the Judiciary and the Registrar of Births and Deaths did not require such a procedure to be followed. Since then, the applicant's official date of birth has been honoured as being 30.12.1949 such as in the certificate of birth; passport; tax documents; declarations of income, assets and liabilities filed regularly with the Judiciary; and the date has never been questioned. In the Judiciary on-line data base on the applicant's personal details, the date of birth is indicated as 30.12.1949. In June 2003 the applicant was appointed to the office of Judge of the Court of Appeal and the date of birth was 30.12.1949. The claimant completed on 22.12.2011 the vetting questionnaire issued by the Judges and Magistrates Vetting Board and indicated his date of birth as 30.12.1949.

6. By the notice of retirement Ref. No. CRJ/3.1 dated 30.10.2018 the 2nd respondent conveyed to the applicant that the records held by the Judiciary indicated that the applicant would attained the mandatory retirement age of 70 years on 01.06.2019 and therefore the applicant was being notified that he will retire from the Judiciary with effect from 01.06.2019. The letter set out the documents the claimant was to submit in the retirement process towards computation of his pension benefits and further thanked the claimant for the distinguished service he had rendered to the Judiciary for 43 years and 10 months.

7. The applicant responded by his letter dated 30.11.2018 addressed to the 2nd respondent thus,

> " Re: Notice ofRetirement
>
> Ihave received your notice dated 30th October 2018 with thanks.
>
> The notice indicates that records in your office show that I will have attained the age of seventy (70) years on 1st June 2019.
>
> If my memory serves me right, there are no records indicating that I was born on 2nd June, 1949. I enclose a copy of my Identity Card and a copy of Certificate of Birth which was issued about 20 years ago indicating date of birth as 30th December, 1949.

Article 259 (5) (c) of the Constitution stipulates the formula for computing years under the Constitution. According to that formula, I will attain the age of 70 years on 29th December, 2019 at midnight.

Kindly, urgently clarify the date of retirement so that I can arrange my affairs appropriately.

E.M. GITHINJI

Judge ofAppeal

Copy to:

The Chairman

Judicial Service Commission"

8. The 2nd respondent replied by the letter reference No. 3/1 dated 28.01.2019 that records held in the Judiciary offices indicate that from his job application form (PSC Form) signed by the applicant on 11.04.1975 the applicant specified his date of birth as 1949. That the date had been accepted and captured upon first appointment and the letter stated thus, "The Government policy stipulates that where an officer indicates only the year of birth on PSC form, he/she is deemed to have been born on 1st July of that year.

9. In view of the above, we wish to clarify that your retirement date shall be 1st July, 2019 and not 1st June 2019 as earlier communicated.

We regret the inconvenience caused."

10. The circular by the Directorate of Personnel Management Ref. No.DPM 7/7/43A Vol. IV/ (125) dated 15.11.1982 then under the Office of the President titled "DATE OF BIRTH" stated as follows:

" The policy with regard to determination of an officer's age for purpose of retirement was set out in Establishment Circular No. 43 of 13th November, 1958 as varied by Treasury Circular No. 23 of 14th August, 1967.

On first appointment a candidate is required to declare his age and date of birth in the Application for Employment Form PSC 2. This information is given voluntarily without any duress and it is vouched as correct by the candidate. The record of age is important because Regulation 23 of the Pensions Regulations provides that any period of service while an officer is under the age of 18 years shall not be taken into account as pensionable service.

It has been noted that there has been a growing tendency on the part of officers to alter their dates of birth when they realize that they are approaching retirement age so that they can stay on longer in the service. They do this by obtaining Birth Certificates from the Registrar of Births and Deaths. In order to curb this undesirable tendency, it has been decided that with effect from the date of this Circular, the applications for late registration of births from civil servants shall be routed through their Permanent Secretaries/ Heads of Departments who will endorse each application to the effect that the date of birth indicated therein tallies with the officer's declared age on first appointment as reflected in official personal records. The Registrar of Births and Deaths will not issue a Birth Certificate to a civil servant other than through this process. Any Birth Certificate obtained by an officer in future without complying with the new requirement will not be honoured for purpose of determination of age on retirement.

With regard to Birth Certificates issued before the date of this Circular, it is pointed out that where cheating is strongly suspected, the officer concerned may be retired compulsorily by application of the provisions of section 8 of the Pensions Act (Cap.189).

Permanent Secretaries / Heads of Department are requested to bring the provisions of this circular to the attention of all officers and to ensure that the provisions of Regulation G 44 of the Code of Regulations in regard to retirement on attainment of the age of 55 years are strictly observed.

A.K. KANDIE

Permanent Secretary / Director of Personnel Management"

11. The circular was copied to officers across the Government including to the Registrar, High Court of Kenya.

12. The Office of the Prime Minister, Ministry of State for Public Service issued circular Ref. No. DPM PA/5/7 VOL. LII/ (170) dated 25.09.2008 titled "Amendment/ Variation ofDate ofBirth". The circular referred to and reproduced the circular by the Directorate of Personnel Management Ref. No.DPM 7/7/43A Vol. IV/ (125) dated 15.11.1982 and concluded thus,

" It has been decided that with effect from the date of this circular, dates of birth as voluntarily declared on first appointment shall be maintained without variations. The Ministry of State for Public Service will no longer consider any requests for variation of dates of birth. Heads of Human Resource Management Divisions in Ministries / Departments should ensure that dates of birth as declared on first appointment are maintained without variation.

Authorized Officers are requested to note the contents of this circular and take necessary action accordingly.

Signed

Titus M. Ndambuki, CBS

PERMANENT SECRETARY"

13. The circular was addressed to "All Permanent Secretaries / Authorized Officers" The Ministry of Devolution and Planning, Directorate of Public Service Management issued a reminder circular Ref. No. MDP/DPSM.2/3 dated 14.10.2013 referring to the circular Ref. No. DPM PA/5/7 VOL. LII/ (170) dated 25.09.2008 thus, "In the circular it was communicated that dates of birth as voluntarily declared by officers on first appointment shall be maintained without variation. It was further decided that the Ministry would no longer consider any requests for variation of dates of birth and that Heads of Human Resource Management Divisions should ensure that dates of birth as declared on first appointment were maintained without variation." The reminder was signed by Juster Nkoroi, EBS, Principal Administrative Secretary, and addressed to "All Authorised Officers"

14. By the letter dated 26.02.2019 the applicant addressed to the 2nd respondent a demand notice to sue urging as follows:

    a) The proposed effective date of retirement 01.07.2019 is not lawful and breaches the principle of legality which governs administrative decisions under Article 47 of the Constitution and the Fair Administrative Actions Act. Under that Act, an administrative decision should be lawful, reasonable, procedurally fair, proportional and rational.

b) The administrative decision does not meet the requirements of the Constitution and the Fair Administrative Actions Act by reason of the following reasons.

c) The retirement age on attaining 70 years is prescribed in Article 167(1) of the Constitution. The formula of computing years under the Constitution is prescribed by Article 259(5) (c) which refers to specific dates. The dates can only be determined by the dates shown in the certificate of birth.

d) It is arbitrary and not based on contract or statute or decision based on oral evidence for the applicant's retirement date to be 01.07.2019 on the basis, "The Government Policy stipulates that where an officer indicates only the year of birth on PSC Form, he / she is deemed to have been born on 1st July of that year."

e) The circular was issued in 1958 prior to the current Constitution of Kenya, 2010 and it is not in line with Article 47 and the Fair Administrative Actions Act.

f) The circulars were aimed at curbing dishonesty in the date of birth and in the applicant's case, he says he was born on 30.12.1949 and the birth certificate was issued in 1999 when the retirement age for Judges was attainment of 74 years of age. It was not made in contemplation of imminent retirement as contemplated in the circulars.

g) The decision is unreasonable and irrational because the date of birth has been inserted in all the applicant's official documents, tax documents, passports, bank documents and others. Thus, the applicant's case is that altering the official date of birth will expose him to great prejudice including criminal liability.

h) The certificate of birth was issued by the Registrar of Births and Deaths in the course of his duties after being certified on evidence before him including from administrative officers that the date of birth was correct. The certificate is a public document and unless it is proved not to be genuine or based on false evidence, it is by section 26(4) of the Births and Deaths Registration Act, and section 83 (1) of the Evidence Act presumed to be genuine and the facts stated therein true. Disregarding such a document is acting contrary to law.

  i) The decision is based on policy circulars issued by the executive and is not a decision by the Judicial Service Commission under Article 172 (1) (b) of the Constitution.

j) It is not a case of altering the year of birth. It is a case of calling on the administrator to ascertain the exact date of birth within the year from an old and genuine public document so as to comply with the Constitution. A fair administrative action should take account of the document.

k) The decision adversely affects the applicant's retirement benefits.

l) The applicant was not given a hearing prior to the decision being made and that was in breach of the rules of natural justice.

15. The 1st and 2nd respondent filed on 25.04.2019 (through Isaac J.M. Wamaasa Advocate) the replying affidavit of Ann Amadi, the Chief Registrar of Judiciary and the Secretary of the Judicial Service Commission. It was stated that the applicant obtained his certificate of birth on 29.10.1999 without following the procedure set out in the circular dated 15.11.1982. Further, after obtaining the certificate of birth he did not apply to vary the date of birth as declared to the respondents. Further in issuing the notices for retirement of the applicant, the respondents relied on the claimant's own declaration and therefore the decision was not subject to the Constitution and Fair Administrative Action Act.

The decision was therefore not unreasonable or irrational and it was not a decision prejudicial to the applicant. The 1st and 2nd respondents' case was that whereas the certificate of birth, passport, and personal identification number are public documents, it was the duty of the applicant to formally request the relevant government authorities to vary his date of birth. The reason of adopting the date of birth on the PSC 2 form rather than the one on the certificate of birth was, in the 1st and 2nd respondent's case, well founded. The 1st and 2nd respondents urged that the applicant's case lacked merit because it challenged the merits of the decision rather than the process of the notification of the decision.

16. The 3rd respondent, the Attorney General of the Republic of Kenya, filed on 27.05.2019 a reply to the application through Emmanuel Bitta, Deputy Chief State Counsel. The 3rd respondent gave notice that it supported the applicant's case upon the following grounds.

    a) That by dint of the provisions of both section 83 of the Evidence Act and section 26 of the Birth and Deaths Registration Act, Chapter 149 of the Laws of Kenya, the applicant's date of birth is the one stated in his birth certificate.

    b) That neither the 1st nor the 2nd respondent has the legal mandate to invalidate a birth certificate issued by the Principal Registrar under the Births and Deaths Registration Act.

    c) The applicant was not heard prior to making the decision and Article 47 of the Constitution and the Fair Administrative Actions Act were thereby violated.

    d) The Principal Registrar under the Births and Deaths Registration Act made no representations prior to the decision being made and therefore the decision was made without taking into account relevant facts and considerations.

    e) The date disclosed by the applicant in his birth certificate does not vary with the disclosure he made in his employment application details.

17. The parties filed their respective submissions. The Court has considered the material on record and the submissions filed and determine the issues in dispute as follows.

18. The 1st and preliminary issue is whether the application should fail because it seeks judicial review of the notices to retire (the offending decision) on merits and not the procedure leading to the decision as is the case in traditional judicial review proceedings. In Suchan Investment Limited –Versus- Ministry of National Heritage & Culture & 3 Others [2016] KLR the Court of Appeal held that on account of consideration of proportionality and unreasonableness of a decision in issue, analysis of Article 47 as read with the provisions of the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. In that case the Court held, "….In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7(2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The Court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

19. The court also upholds its opinion in the judgment in George Maina Kamau –Versus-The County Assembly of Murang'a and 2 others [2016]eKLR thus, "Nevertheless, the court is not setting a hard

rule that its jurisdiction is limited to only an inquiry into procedural matters. The rule the court is setting is that it will consider all cases where illegality is alleged both in matters of substance and procedure. The court says that it would have to look into merits of the grounds for removal in an appropriate case where a petitioner may seek to show illegality founded upon the county assembly moving against the petitioner under the said section 40 upon illegal grounds; such that illegality would be founded upon the principle of unreasonableness per Lord Greene in Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683 thus, "It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

20. In view of the cited cases, the Court returns that the applicant has alleged unreasonableness and illegality and the Court returns that an analysis of the decision would be necessary to make a finding on the allegations one way or the other. In such circumstances, a review on merits would be necessary and the Court returns that review on merits is increasingly permissible towards determining the reasonableness or legality of an impugned decision so that an application seeking a review on merits will not fail on that account alone.

21. The 2nd issue for determination is whether the circulars applied to the applicant. Whereas the applicant signed the Public Service Commission Form PSC 2 in applying to join the judiciary as a Second Class Magistrate, over time the Republic became more and more sophisticated and there is no doubt that the applicant was serving in the Judiciary, an Arm of Government as opposed to an agency, ministry or department of the Executive Arm that the circulars clearly applied to. The circular of 15.11.1982 is clear that it applied to registration of births by civil servants. The Black's Law Dictionary 10th Edition defines "civil service" as "1.The administrative branches of a government. 2. The group of people employed by these branches – civil servant, n" The Court returns that clearly the applicant served in the Judiciary and he was not serving in the civil service – he was not a civil servant. Thus the Court returns that the circular of 15.11.1982 as amended did not apply to the claimant as a Magistrate and then later as a Judge. He was not a civil servant throughout his service in the Judiciary.

22. In any event, the Court returns that the circulars were merely administrative policies and they could not override the clear provisions of the relevant and applicable statute. As submitted for the applicant and the 3rd respondent, section 26(3) of the Births and Deaths Registration Act, (Cap.149) provides that the Principal Registrar shall, on payment of the prescribed fee, furnish a certificate in the prescribed form of the birth of any person compiled in the prescribed manner from the records and registers in his custody. Section 26 (4) of the Act provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any other proof of such entry. Further section 83 (1) of the Evidence Act provides that the Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is:

a) declared by law to be admissible as evidence of any particular fact;

b) substantially in the form, and purporting to be excluded in the manner, directed by law in that behalf; and

c) purporting to be duly certified by a public officer.

23. Section 83(2) of the Evidence Act further provides that the Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.

24. Thus the Court presumes that the applicant's birth certificate is the true evidence of the dates and other facts it declares and the officer who issued the certificate had the authority to issue it and he issued the certificate relying on the entries in the register and such useful and relevant information. The Court finds that the circular was clearly ultra vires in prescribing a step in acquiring the birth certificate, namely applying through the Permanent Secretary or Head of Department but which was never provided for or contemplated under the Births and Deaths Registration Act, (Cap.149) –and it was equally ultra vires and offensive of the principle of legality for the respondents to require the petitioner to have complied with such ultra vires procedural step when he applied for his certificate of birth. The Court returns that besides stating that he had not been notified about that procedure in the circular for applying for the birth certificate, the Court holds that it was unnecessary and unlawful to bind the applicant to such ultra vires policy that was inconsistent with the statutory provisions on the procedure for applying for the birth certificate.

25. The Court returns that for the stated reasons the circulars did not bind and apply to the applicant's service and further, they prescribed and imposed on civil servants an ultra vires and therefore unlawful procedural step in applying for a birth certificate.

26. The 3rd issue for determination is whether the applicant failed to notify the 1st and 2nd respondents that his date of birth was 30.12.1949. The answer to the issue is rather straightforward. The claimant notified when he was employed as a magistrate that his date of birth was 1949. Subsequently, in accordance with provisions of the Births and Deaths Registration Act, (Cap.149) the applicant applied and obtained the birth certificate on 29.10.1999 and showing that he was born on 30.12.1949. First the Court finds that the declared date was not inconsistent with the year of birth as initially declared. Secondly the applicant was appointed Ag. Puisne Judge in May 1987 and Judge of Appeal in June 2003. The on-line personal details maintained by the 1st and 2nd respondent show the applicant's date of birth as 30.12.1949 – and the Court finds that the data was one instance the applicant notified the 1st and 2nd respondents about the date of birth. Third, on 22.12.2011 the applicant notified the same date of birth by completing the vetting questionnaire issued by the Judges and Magistrates Vetting Board. Fourth, it is not disputed that the applicant has consistently completed the declarations of incomes, assets and liabilities as required under the Public Officer Ethics Act, 2003. The 1st and 2nd respondents do not deny receiving such applicant's declarations. Section 28(1) of the Act provides thus "A person who has submitted a declaration to a Commission shall provide, without undue delay, any clarification requested by the Commission if the request is in writing and is made within six months after the declaration was submitted to the Commission." The 1st and 2nd respondents have not shown that they ever asked the applicant to make a clarification about his date of birth and instead it is urged for them that it was his duty to notify about his date of birth – and the Court considers that it would be unjustified and unfair for the respondents to shift their statutory obligation and make it the applicant's burden.

27. The Court returns that in the instances narrated, the applicant clearly notified about his date of birth but the 1st and 2nd respondents made no dispute or demanded a clarification in that regard.

28. While making that finding the Court follows its opinion in Rufus Osotsi Olefa –Versus- Nairobi City Water and Sewarage Company Limited [2018]eKLR, where, as submitted for the 3rd respondent, the Court held, "There is no dispute that at all material times of the employment the claimant's date of birth was recorded as 1955 until 16.10.2006 when he was given a personnel form by the respondent and he indicated the date of birth as December 1955. Earlier in 2004 the claimant had completed the NHIF statutory personal data form and indicated that his date of birth was on 01.12.1955. The Court finds that the respondent at that time did not dispute the data and the Court returns that the data thereby became incorporated in the contract of service as the claimant's date of birth. The parties are bound accordingly. Accordingly the Court returns that the contractual date of birth was December 1955 and the claimant cannot suffer loss arising from the respondent's deficiency in the respondent's operational requirements, systems, and policies. The respondent pleaded and decried the habit of its employees changing their dates of birth to achieve service beyond attainment of the 60 years of retirement age. The respondent did not exhibit any operational requirements, systems, and policies it had put in place to curb that emerging trend. Further the respondent failed to show that as at the time the claimant filled the personnel data showing that his date of birth was December 1955, he had thereby fraudulently changed his date of birth. The evidence is that up to the date the claimant completed the personnel form, the record was that he was born in 1955 and the specific date being at large or unknown, there is no reason to penalise the claimant for reporting the most advantageous date, the respondent having stated that it was aware of such predicaments but failed to institute or negotiate a policy position. It is the opinion of the Court that where the employee is faced with a genuine situation to elect one or other factor, term or condition of service as was the case in the instant case, the employee will be presumed and is entitled to opt for the most favourable option. Further, section 45(2) (b) of the Employment Act, 2007 provides that a reason for termination is valid if it relates to the employee's conduct, capacity or compatibility, or, is based on the employer's operational requirements. The Court returns that the reason for retirement in the instant case was not valid because it did not pass the prescribed test."

29. In the present case, the Court has found that the policies as relied upon by the 1st and 2nd respondents applied to civil service and not the judicial service and, in any event, the policies as relied on were ultra vires the clear provisions of the Births and Deaths Registration Act and the Evidence Act and therefore null and void ab initio.

30. The Court has further considered the mischief the circulars were designed to curb and returns that in view of the returned ultra vires policy, it would be appropriate to enhance the safeguards for implementation or administration of the Births and Deaths Registration Act and if any deficiencies have been observed in the implementation or administration of the Act (but which were not highlighted to the Court at all in the present case) then the appropriate legislative interventions would be available to the respondents towards achieving the desired outcomes.

31. To answer the 4th issue for determination, the Court returns that it was unreasonable and illegitimate for the 1st and 2nd respondents to fail to reckon the applicant's date of birth as 30.12.1949 in view of the cited provisions of the Evidence Act, the Births and Deaths Registration Act, the Public Officer Ethics Act and as read with Article 47 of the Constitution and the Fair Administrative Action Act. In particular and as submitted for the applicant, the 1st and 2nd respondents did not give him lawful reasons for the imposition of the retirement date as 01.07.2019 and as envisaged in Article 47 (1) and (2). As submitted for the applicant, Article 167 (1) of the Constitution provides that a Judge shall retire from office on attaining the age of seventy years but may elect to retire at any time after attaining the age of sixty – five years. Further, Article 259 (5) (c) of the Constitution provides that in computing time, if

time is expressed as years, the period of time ends at the beginning of the date of the relevant year that corresponds to the date on which the period began. Thus the Court finds that the applicant's date of birth was on30.12.1949 and he will attain 70 years of age on 30.12.2019 and not on 01.07.2019. Thus the date of retirement as imposed to be 01.07.2019 is found to have been unreasonable and illegitimate.

32. To answer the 5th issue for determination, the Court returns that the procedure for terminating the applicant's service was unfair and the applicant was entitled to submit that the rules of natural justice had been breached. First, Article 260 of the Constitution defines "Public Officer" to mean a State Officer or any person, other than a State Officer, who holds a public office. "State Officer" means a person holding a "State Office" and which includes Judges and Magistrates. Article 236 (b) provides that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The Court returns that the decision to retire the applicant prematurely amounted to an adverse action or punishment without according the applicant due process of justice as is known in rules of natural justice. The 1st respondent is established under Article 171 of the Constitution and in Article 172 (b) one of its functions is to review and make recommendations on the conditions of service of judges and judicial officers other than their remuneration. The Court holds that that retirement age is a term and condition of service and once the applicant disputed his effective date of retirement his case properly fell due for review by the 1st respondent and for making of an appropriate recommendation as per Article 172(b) of the Constitution – and it is not necessary for the Court to repeat that if the decision (review and recommendation) would be adverse, then the applicant was entitled to due process in arriving at the decision. The Court has re-examined the material on record and returns that there was no evidence that the applicant's case had been reviewed by the 1st respondent and recommendations made in that regard. Thus the Court finds that the applicant was entitled to urge that despite the dispute he had raised, an adverse decision had been made against him without his being accorded due process as is well known as rules of natural justice. As submitted for the applicant section 4 of the Fair Administrative Action Act as read with Articles 47 and 236(2) of the Constitution the provisions clearly required the 1st respondent to hear or consider the applicant's case in that regard.

33. To answer the 6th issue for determination the Court returns that the applicant has established his case against the respondents and the remedies as prayed for are found justified. There was no material before Court to suggest that there was an established bar to granting of any of the prayers as made for the applicant. The Court will therefore grant the prayers accordingly.

34. In conclusion judgment is hereby entered for the applicant against the respondents for:

    a) The judicial review order of certiorari hereby issued to quash the decision of the 1st and 2nd respondents to retire the applicant from employment as communicated in the retirement notice through a letter dated the 30.10.2018 and another one dated 28.01.2019 (both Ref. CRJ 3/1) from the 2nd respondent to the applicant.

    b) The judicial review order of mandamus hereby issued to compel the 1st respondent, the Chief Registrar of the Judiciary and other relevant authorities including the 2nd and 3rd respondents to give effect to the applicant's certificate of birth No. 648XXX dated 29.10.1999 certifying that the applicant was born on the 30.12.1949.

    c) The judicial review order of prohibition hereby issued directed to the respondents jointly and severally barring them from acting on or implementing the Government policy directions dated 15.11.1982; 28.11.1990; 25.09.2008 and 14.10.2013 in making their decision to retire the applicant herein.

d) The 1st and 2nd respondents to jointly or severally pay the applicant's costs of the leave stage and substantive proceedings herein.

SIGNED, DATED AND DELIVERED IN COURT AT NAIROBI THIS FRIDAY 28TH JUNE, 2019.

BYRAM ONGAYA

JUDGE