



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 41 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 29th October, 2019)

SUYIANKA LEMPAA.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner filed the Petition herein on 7th February 2019 to challenge the constitutionality and legality of the 1st Respondent's recruitment process of 29th January 2019. The Petition was amended on 3rd May 2019 wherein the Petitioner sought the following reliefs:-

- i. A declaration does issue that Section 57 (1) (a) of the Code of Regulation for Teachers 2015 is discriminatory and in violation of Article 27 (4) of the Constitution and Section 5 of the Employment Act of 2007.*
- ii. A declaration does issue that Section 57 (1) (c) of the Code of Regulation for Teachers 2015 is discriminatory and in violation of Article 27 (4) of the Constitution and section 5 of the Employment Act of 2007.*
- iii. A declaration does issue that the including a must condition of age 45 and below to be recruited by the 1st Respondent as a teacher in secondary school is arbitrary, unconstitutional and thus void ab initio and violates Article 27 (4), 10, 232 and section 16 of the Teachers Service Commission Act and section 5 of the Employment Act.*
- iv. A declaration does issue that to the extent that the Respondent have sought to limit a fundamental right without a justification in law, or in fact or as contemplated under Article 24 on limitation of fundamental (sic) is improper and unreasonable thus null and void.*
- v. The Respondents be compelled to conduct a fresh teacher recruitment process without discriminating on age or any other forbid ground.*
- vi. Any other order that the Honourable Court deems fair and fit to make in the circumstances of the Petition.*
- vii. Costs of the Petition.*

2. The Petitioner avers that on 29th January 2019, the Respondent commenced a countrywide recruitment exercise by sponsoring an advertisement where qualified Kenyans of 45 years and below were required to apply. Since the Petitioner was above the age of 45 years, he could not apply.

3. The Petitioner further avers the advert indicated that correspondences were to be made to the TSC county directors or Board of Management and that no direct correspondences on the recruitment would be tolerated. This made it difficult to resolve the matter with the 1st Respondent directly.

4. It is the Petitioner's case that the retirement age in the public service has been set at 60 years. As such, restricting the entry age to 45 years was denying deserving Kenyans the opportunity to serve as teachers for the remaining active 15 years. It is therefore his position that the decision was unreasonable and discriminatory since it was not justified in law or fact.

5. The 1st Respondent has opposed the Petition vide the Replying Affidavit of Peter Kega filed on 8th April 2019. They aver that they have the mandate to recruit and employ teachers so as to ensure there is appropriate balance in the teacher staffing levels in the country. They contend that the 1st Respondent is an equal opportunity employer whose recruitment process is guided by the law and its policies.
6. The 1st Respondent avers that the impugned advertisement was placed to support the 100% transition policy from primary to secondary schools. They contend that advertisement was guided by regulation 57 of its Code of Regulations for Teachers (CORT) which requires recruitment of persons who are below the age of 45. As such, the Petitioner's assertion that the impugned decision was arbitrary, discriminative and unconstitutional is unfounded.
7. The 1st Respondent further avers that the age restriction was introduced to maintain efficiency, institutionalize succession planning and persons agile enough to engage the expectation of learners in public schools.
8. The Respondent avers that the recruitment process has been completed and binding employment contracts issued to the successful applicants.
9. The Petition was disposed of by way of written submissions where the Petitioner filed his Petition on 25th July 2019 and the Respondent on 17th September 2019.
10. The Petitioner submits that the 1st Respondent has the mandate to protect the sovereignty of the people of Kenya under Article 249. In restricting the recruitment process to people under the age of 45, the 1st Respondent failed to meet its mandate.
11. The Petitioner further submits that the provisions of the 1st Respondent's Regulations, conflict with the principles that are entrenched in the Constitution. He relies on the case of **Jared Juma vs. Kenya Broadcasting Corporation & 3 Others [2014] eKLR** and **Harksen vs. Lane NO and Others [1997] ZACC 12; 1998 (1) SA 300 CA (CC); 1997 (11) BCLR 1489 (CC).**
12. The Petitioner also submits that the 1st Respondent has not presented empirical evidence that anyone at or above the above age of 45 years is not agile enough to engage the expectation of learners in public schools. As such, the differentiation on the ground of age by a constitutional commission is contrary to the legitimate government purpose and rely on the case of **Sali vs. National Commissioner of the South African Police Service and Others [2014] ZACC 19.**
13. The Petitioner also submits that although the right against discrimination is not absolute, the onus of establishing that the limitation is justifiable lies on the state organ or person limiting that right under Article 24 and relies on the case **Muslims for Human Rights (MUHURI) & Another vs. Inspector General of Police & 5 Other [2015] eKLR**, **South African Airways (Pty) Limited vs. G.J.J.V.V. Case No. C420/2006, Brioche vs. Attorney General [2013] SLR 425** and **Fredrick Gitau Kimani vs. Attorney General & 2 Others [2012] eKLR.**
14. The 1st Respondent submits that the restriction on age is not to discriminate but to promote and maintain efficiency, institutionalization and succession planning. It is their further submission that the limitation is founded on permissible classification in order to meet the legitimate interest of giving an opportunity to teachers employed by the Respondent on permanent and pensionable terms to grow and attain the highest cadre in the teaching profession as well as retire early at the age of 50.
15. However, the 1st Respondent submits that in the event its act is found to be discriminatory, then the same should be found to be positive discrimination thus falling within the ambit of Article 24 (1) of the Constitution. They rely on the case of **Jack Mukhongo Munialo & 12 Others vs. Attorney General & 2 Others [2017] eKLR** where the Court was of the view that the test to determine whether a limitation is permissible is whether it is limited by law and is reasonable and justifiable in an open and democratic society.
16. The 1st Respondent submits that since the Code of Regulation for Teachers being a subsidiary legislation, it was therefore enacted in accordance with the requirements and provisions of the Statutory Instruments Act hence lawful. Consequently, the age limit having been set in law and the Respondent having been guided by the law in setting the same, the act was reasonable, justifiable and within the law.
17. As regards the Petitioner's reliance upon the case of **Jared Juma vs. Kenya Broadcasting Corporation & 3 Others [2014]**, the 1st Respondent submits that the facts and circumstances of the case are different from the circumstances of this Petition. That is, the limitation in the case had no justification whereas there is a justification in the Petition herein and relies on the case **Nelson Andayi Havi vs. Law Society of Kenya & 3 Others [2018] eKLR.**
18. I have examined all the evidence and submissions of both Parties. In determining this Petition, I note that the qualification for a teacher to serve in this country have been qualified by statute and by regulations. The maximum age to serve has also been qualified by the regulation, which caps 60 years as the retirement age.
19. The Petitioner has argued that the Respondent in putting a cap on the entry age at 45 years, are being discriminatory. That this cap locks him out of employment on account of age which infringes on his right to be employed.
20. Article 232 of the Constitution sets out values and principles of public service as follows:-

1) ***"The values and principles of public service include:-***

a) high standards of professional ethics;

- b) efficient, effective and economic use of resources;*
 - c) responsive, prompt, effective, impartial and equitable provision of services;*
 - d) involvement of the people in the process of policy making;*
 - e) accountability for administrative acts;*
 - f) transparency and provision to the public of timely, accurate information;*
 - g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*
 - h) representation of Kenya's diverse communities; and*
 - i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of:-*
 - (i) men and women;*
 - (ii) the members of all ethnic groups; and*
 - (iii) persons with disabilities.*
- 2) The values and principles of public service apply to public service in:-**
- a) all State organs in both levels of government; and*
 - b) all State corporations.*

3) Parliament shall enact legislation to give full effect to this Article.

21. Other than Article 232, Article 10(2) of the Constitution sets out values that should govern service of state officers and public officers who include teachers here. These values includes:-

- 1) "The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them:-**
 - a) applies or interprets this Constitution;*
 - b) enacts, applies or interprets any law; or*
 - c) makes or implements public policy decisions.*
- 2) The national values and principles of governance include:-**
 - a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
 - b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
 - c) good governance, integrity, transparency and accountability; and*
 - d) sustainable development.*

22. The issue of age does not however feature in any of these 2 articles. I take judicial notice of the fact that there is a high degree of unemployment in Kenya. People also strive due to economic hardship to go to school and some make it albeit with difficulties to make it late in life.

23. Indeed it has not been shown by the Respondents that men and women about 45 years of age cannot effectively serve as teachers.

24. The Respondent have not explained why they capped this age at 45 and not say 40 years. In this Court's view, the lower capping of age at 18 years would be reasonable because it is the age of majority in Kenya.

25. The Respondent however have no justifiable reason to set regulations limiting entry of teachers in the profession at 45 years especially so due to the high unemployment rate in Kenya.

26. In this Court's view, the capping is discriminatory on account of age and serves no purpose in the circumstances. The capping locks out eligible teachers who may be willing to serve and the capping serves no purpose unless justified.

27. In the circumstances, I find the Petition has merit and I find as follows:-

1. A declaration does issue that including a must age meet condition of age 45 and below to be recruited by the 1st Respondent as a teacher in Secondary School is arbitrary, unconstitutional and thus void ab initio and violates the law and the Constitution.

2. A declaration does issue that to the extent that the 1st Respondent has sought to limit a fundamental right without a justification in law, or in fact or as contemplated under Article 24 on Limitation of is improper and unreasonable thus null and void.

3. That future recruitment processes by the 1st Respondent should proceed without discriminating on age or any other forbidden grounds.

4. Costs of this Petition be borne by each Party.

Dated and delivered in open Court this 29th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo holding brief Manyara for 1st Respondent – Present

Petitioner in person – Absent