



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2557 OF 2016

DR. MARY KERUBO OSORO.....CLAIMANT

VERSUS

PUBLIC SERVICE COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1. The dispute in this case arises from the Respondent's decision to retire the Claimant, who is a person with disability, at the age of sixty (60) years. The basis of the claim is an existing government policy, which fixes the retirement age for persons with disability at sixty five (65) years.
2. The claim is contained in a Memorandum of Claim dated 13th December 2016 and filed in court on 14th December 2016. The Respondent filed a response to the claim and a replying affidavit to the application on 8th February 2017.
3. The matter first came before me by way of an application under certificate of urgency on 14th December 2016, when I granted interim orders restraining the Respondent from retiring the Claimant. When Counsel for the parties appeared before me on 9th February 2017, they agreed to dispense with both the application and the main claim by way for written submissions.

The Claimant's Case

4. The Claimant is a civil servant currently serving in the capacity of Director, Human Resource Management and Development in the Ministry of Agriculture, Livestock and Fisheries.
5. In August 2013, the Claimant, while walking in the course of duty, slipped and fell, sustaining injuries. She was attended at the Nairobi Hospital and was subsequently referred to Shalby Hospital in India for specialized treatment. In February 2014, the Claimant sought and was granted official clearance to travel to India. She was admitted at the Spine Clinic at Shalby Hospital from 16th February 2014 to 28th February 2014 where she was diagnosed with severe spine injuries
6. On her return from India, the Claimant was under the care of Dr. Ating'a, a Consultant Orthopaedic Surgeon based at the Nairobi Hospital. Despite the specialized treatment in India and follow up in Kenya, the Claimant was in pain and on the advice of her doctor, she underwent a disability medical examination on 18th December 2015.
7. Upon recommendation by the Director for Medical Services, the Claimant was registered as a person

with disability, under the Persons with Disabilities Act. She subsequently requested for tax exemption under Section 12(3) of the Persons with Disabilities Act and was issued with a certificate of tax exemption on 30th May 2016.

8. The Claimant also requested for extension of her retirement age to 65 years. Upon submission of her request for extension of retirement age, the Claimant, who would otherwise retire on 24th December 2016, at the age of 60 years, was subjected to a medical examination to ascertain her fitness to continue in service. The National Medical Board, in a report dated 11th November 2016, found that the Claimant was fit for further service.

9. Despite the finding by the National Medical Board and the Claimant's registration as a person with disability, the Respondent, through the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries, issued the Claimant with a retirement letter dated 23rd December 2016.

10. It is the Claimant's case that the Respondent's decision to retire her effective 24th December 2016 is illegal, discriminatory and contrary to her legitimate expectation. The Claimant seeks the following remedies:

- a) A declaration that being a duly registered person with disability and having been found medically fit for further service, she is entitled to serve until the age of 65 years;
- b) A declaration that the retirement notice dated 26th January 2016 is null and void;
- c) 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.

The Respondent's Case

11. In its response dated 6th February 2017 and filed in Court on 8th February 2017, the Respondent states that the Claimant was lawfully retired following a report by the National Medical Board, indicating that the Claimant had remarkably improved with no lateralizing signs. The report further stated that she could easily move around, bend and sit without straining.

12. The Respondent maintains that registration by the National Council for Persons with Disabilities is not *prima facie* evidence of disability and does not qualify one to be a person with disability as contemplated under Article 260 of the Constitution and the Persons with Disabilities Act.

Findings and Determination

13. There are two issues for determination in this case:

- a) Whether the Respondent's decision to retire the Claimant at the age of 60 years was lawful;
- b) Whether the Claimant is entitled to the remedies sought.

The Retirement

14. By its letter dated 26th January 2016, the Respondent gave notice to the Claimant that she was due to retire from the public service, effective 24th December 2016. The Claimant wrote back on 27th January 2016, drawing the Respondent's attention to two government circulars dated 29th May 2012 and 19th September 2014, whose effect was to enhance the retirement age for public servants with disabilities from 60 to 65 years. The Claimant also pointed out that she had been registered as a person with physical disability by the National Council for Persons with Disabilities.

15. Upon receipt of the Claimant's letter, the Respondent asked the Director of Medical Services to

convene a Medical Board, to assess the Claimant's fitness for further service. The Claimant appeared before the Board on 6th October 2016, whose conclusion was as follows:

“Dr. Osoro was diagnosed to have developed degenerative disc disease at L4 L5 in 2013 for which she underwent surgical treatment. Following a review today she has remarkably improved with no lateralizing signs. She is able to move around easily, bend formerly, and sit without straining. In view of the above and the kind of duties she performs, we recommend that she is fit for further service.”

16. Following the report by the Medical Board, the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries wrote to the Claimant on 1st December 2016 as follows:

“This is to inform you that the Public Service Commission vide letter Ref. No. PSC/ADM/103/11/(25) dated 23rd November has disallowed your request that your retirement age be extended until you attain the age of sixty-five (65) years, on account of being a public officer with disability as you do not qualify for such extension in line with the provisions of No. MPS/HRM/2/2/VOL.II (21) of 29.5.2012.

In addition the National Medical Board has assessed your condition and noted remarkable improvement and fitness for further service thereby invalidating the notion of permanent disability.

The purpose of this letter is to notify you of the decision made on your request.

Willy Bett

CABINET SECRETARY”

17. Article 260 of the Constitution of Kenya, 2010 defines disability as:

“any physical, sensory, mental, psychological or other impairment, condition or illness 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-today activities.

18. Section 2 of the Persons with Disabilities Act defines disability as:

“a physical, sensory, mental or other impairment including any visual, hearing, learning or physical incapability, which impacts adversely on social economic or environmental participation.”

19. In order to determine the issue of the Claimant's disability status, the Court must ask the question as to how one is certified as a person with disability and therefore eligible to the rights and privileges under the Persons with Disabilities Act. In my view, the answer lies in Section 7(1)(c) of the Act, which provides for registration of persons with disabilities by the National Council for Persons with Disabilities.

20. This was the holding in ***Stephen Kariuki Kamau & 5 others v Kenya Ports Authority & 6 others [2016] eKLR*** where the Court stated as follows:

“For purposes of determining whether any person is suffering from disability as defined in the Constitution and the Persons with Disabilities Act, section 7(1)(c) of the Act provides for registration of persons with disabilities.....to determine whether any employee.....is subject to disability as so defined.

21. Similarly in ***Suleman Angolo & another v Executive Officer Teachers Service Commission [2015] eKLR*** the Court rendered itself as follows:

“Persons with Disabilities enjoy certain rights and benefits as provided in the Persons with

Disabilities Act. These include tax exemption as provided in the Persons with Disabilities (Income Tax Deductions and Exemptions) Order. To enjoy such benefits however one must be registered with the Council-The National Council for Persons with Disabilities. The same would apply in the area of retirement.”

22. The effect of the foregoing jurisprudence, with which I fully associate myself, is that disability as defined in the Constitution and the Persons with Disabilities Act, is a matter of certification and registration by the National Council for Persons with Disabilities, which itself relies on duly completed medical reports.

23. It is not in contest that at the time the Claimant was issued with the retirement notice that triggered this dispute, she was duly registered by the National Council for Persons with Disabilities, as a person with disability. She was also enjoying all the benefits accorded to persons with disabilities, including tax exemption.

24. The Court considered the Respondent’s request for convening of a Medical Board in September 2016, and arrived at the conclusion that the aim was to determine the Claimant’s fitness for further service. In my understanding, this had nothing to do with the Claimant’s disability status. At any rate, there was nothing in the medical report issued by the National Medical Board on 11th November 2016, to suggest that the Claimant had lost her disability status.

25. Nevertheless, it would appear that the Respondent took the conclusion by the National Medical Board to mean that the Claimant was no longer a person with disability and was therefore not entitled to extension of retirement age from 60 to 65 years. It would appear that the Respondent mixed two diverse processes; examination for disability and examination for fitness to serve. As a result, the Respondent misdirected itself and made a decision that has no basis in law or policy.

Remedies

26. Flowing from the foregoing, I proceed to quash the Respondent’s decision to retire the Claimant at the age of 60 years and direct that she shall continue to serve until the attainment of the age of 65 years.

27. The Respondent will meet the costs of this case.

28. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017

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JUDGE

Appearance:

Mr. Mungla for the Claimant

Miss Odhiambo for the Respondent