



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 74 OF 2015

MARGARET MARTHA BYAMA.....CLAIMANT

VERSUS

ALICE A. OTWALA.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF EAST AFRICAN AFFAIRS,

COMMERCE AND TOURISM.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. By a Petition filed on 7th September, 2015, the Petitioner sought orders among others that:-

- a. A declaration be made that the Petitioner's right not to be discriminated against under Article 27 (4), (5), (6) and (7) of the Constitution of Kenya and Article 7 of the Universal Declaration of Human Rights had been violated.
- b. A declaration be made that the failure by the 1st, 2nd and 3rd Respondents to extend the petitioner's Retirement age from 60 years to 65 years in total disregard of the stated Government policy amounted to a violation of her right not to be discriminated against on the grounds of health, age and disability.
- c. A declaration be made that failure by the 1st and 2nd Respondents in recognizing the Petitioner as disabled person pursuant to the Persons with Disabilities Act No. 14 of 2003 is a discrimination against the Petitioner and a violation of her constitutional rights.

2. The facts upon which the petition was brought were in the main as follows:-

- a. The Petitioner was employed as a civil servant of the Government of the Republic of Kenya for the past 33 years since 1982 and was currently employed as Chief Finance Officer, Job Group R,

Department of Commerce and Tourism in the Ministry of the 3rd Respondent.

- b. On 6th January 2015 Dr. Thomas M. Adagala Chiropractic Spinal Health Care practitioner practicing in Nairobi issued a certificate to the Petitioner detailing the Petitioner's medical condition of thoracic spine and cervical illness and chronic lower back pain since 1988.
- c. Upon medical examination on 14th January 2015 the Medical Superintendent, Kiambu District Hospital on behalf of the Director of Medical Services of the Republic of Kenya examined the Petitioner and diagnosed that in 1988 the Petitioner had prolapse inter-vertebral disc and after surgery and treatment at the time, she still suffers from back pains, her posture being altered by the shortening of the lower left limb thereby resulting in a limping gait and numbness in the right leg. The doctor certified that the Petitioner was a person with disability and recommended that the Petitioner should be registered as a person with disability as defined under Article 260 of the Constitution of Kenya and pursuant to section 2 of the persons with Disabilities Act (Act No. 14 of 2013).
- d. The Petitioner was thereupon registered as a person with disability by the National Council for Persons with Disabilities (NCPWD) under the Ministry of Labour, Social Security and Services under section 2 of the Persons with Disabilities Act (Act No. 14 of 2013) as defined under Article 260 of the Constitution of Kenya. She was issued with a registration card.
- e. The NCPWD is a State Corporation under the Ministry of Labour Social Security and Services. It was established following the enactment of the Persons with Disabilities Act No. 14 of 2003 with a mandate to promote the rights of persons with disabilities in Kenya and mainstream disability issues into all aspects of national development.
- f. It is common course that the Petitioner was born on 9th September 1955 and her compulsory retirement age of 60 years was due on 8th September 2015.
- g. On 29th May 2012 the Government of the Republic of Kenya through the then Permanent Secretary of Ministry of State for Public Service had issued directives to the Kenya Government departmental heads including the Respondents inter alia that the mandatory retirement age of Public Servants with disabilities was raised to 65 years.
- h. On the basis of the Medical Reports and after registration under the Persons with Disabilities Act No. 14 of 2013 the Petitioner approached the 1st and the 2nd Respondents for rectification of her employment records to reflect the mandatory age of 65 years.
- i. On 6th May 2015 the 1st Respondent through the 3rd Respondent informed the Petitioner that the 1st Respondents had disallowed her request to extend her retirement age to 65 years.
- j. The 1st Respondent acted without consultation and thereby denied the Petitioner a hearing, and entirely personally and on a frolic of her own, the 1st Respondent alleged that the medical Reports had been brought by the Petition as an afterthought.
- k. On 30th June 2015 through the 3rd Respondent, the Petitioner made an appeal regarding the said decision and explained and fully clarified that the timeline involved clearly indicated it was a matter of coincidence and not an intended afterthought.
- l. That the 1st Respondent was not a qualified and/or specialized medical practitioner to professionally determine the physical status of the Petitioner nor did she seek advice of and/or consult with an independent physician. She misused and misapplied her position of public officer to thereby occasion prejudice and detriment to the Petitioner.

m. The said transgression were in consequence of bad faith of the 1st Respondent and her intent to prejudice the Petitioner despite the 1st Respondent's full awareness as senior public officer of the Government policy to retire civil servants with disabilities at the age of 65 years. In consequence whereof the 1st Respondent lost protection from legal liability granted to an officer by Section 20 of the Public Service Commission Act, 2012.

3. The 1st respondent on her behalf and that of the 2nd respondent refuted through her replying affidavit the Petitioner's accusations by deponing that:-

- a. That as the Chief Executive Officer she was performing her duties in her official capacity and in line with section 16 of the Public Service Commission Regulation 2005.
- b. That under the aforementioned provision of the law, she did communicate the decision of the commission and she did not make her own decision.
- c. That while making the decision, the Commission noted that the Petitioner's medical examination/assessment was done on the 14th January 2015 and her Registration No. NCPWD/244041 was obtained on the 30th January 2015 after being issued with a retirement notice on 12th January 2015.
- d. That the Petitioner as a Senior Finance officer Job Group "R" was aware of the essence as well as consequences of undertaking medical assessment/registration on time vis a vis her retirement.
- e. That for reasons well known to the Petitioner, she failed to undertake that crucial process on time and therefore she cannot use the same to blame the respondents since the respondents actions are best on laid down regulations.
- f. That she stated that the law makers did not error in making it compulsory for every person claiming to be disabled to undergo a medical assessment to enjoy the privileges isolated for people living with disability since it was the only way that could be used to identify genuine persons with disability otherwise the same would be abused.
- g. That she stated that although the Petitioner alleges that she was disabled since 1988, she failed to do her medical assessment/examination to allow her be eligible to the privileges bestowed upon persons with disability as per the act as well as the Constitution 2010.
- h. That she stated that it was not clear to the commission why the petitioner waited to get her medical assessment on 14th January, 2015, upon being served with retirement notice yet she claimed that she had been disabled since 1988. That that apparent delay was unreasonable and questionable in the eye of any ordinary person.
- i. That she further stated that persons with disability under the act enjoy other privileges such as exception from payment of PAYE tax and import duty free vehicles the privileges the petitioner never enjoyed since she had not done medical assessment/registration.
- j. That she stated that if the said petition is allowed, then it would set a bad precedent for the civil servant in the same category to avert the laid down procedure to be able to enjoy the said rights under the Disability Act and the Constitution.
- k. That based on the aforementioned the Commission came to a conclusion that the said medical assessment was intended to avert the retirement which was eminent upon the petitioner.

4. In his submissions in support of the Petition, Mr. Maseke for the Petitioner submitted that the petitioner had demonstrated that she was entitled to conservatory orders since she had attached to the petition copies of certification that she was a person living with disability. If the petitioner was not protected by the

conservatory orders sought she would be subjected to early retirement and thereby lose her constitutional right as a disabled person to be in employment until attainment of 65 years. In support of the submissions, counsel relied on the case of **Giriaru Peter Munya v. Dickson Mwenda Kithinji & 2 Others (2014) eKLR.**

5. Counsel further submitted that the conduct of the respondent in their disregard for the law and the Constitution was callous, disdainful and against public policy and interest. As Civil Servants, the respondents were expected to uphold the provisions of the Constitution on behalf of the public.

6. Counsel further submitted that the interim orders granted on 8th September, 2015 secured the Petitioner's employment but the second prayer for payment of her monthly salary was to await inter parties hearing of the interlocutory application. Consequently the petitioner has continued working but had not been receiving her salary. Counsel contended that the position taken by the respondent that payment of salary should await the granting of the second prayer was fallacious because where a Court orders a party to continue in employment, payment of salary must of necessity to follow that event.

7. Regarding the National Council for Persons with Disability (NCPWD) he submitted that under section 7 of the NCPDW Act the Council has the mandate to advise the Government on matters concerning persons with disabilities. The 1st respondent received advice from NCPDW regarding the special circumstances of the petitioner and was urged to extend her retirement age to 65 but the 1st respondent dismissed this invaluable advice on her perceived personal opinion that it was an afterthought. According to Counsel, the Act does not state that a disabled person must apply for protection under the Act at a particular time. He contended that in certain situations disability is a consequence of illness and the 1st respondent was not a medical officer qualified to make a professional determination of the petitioner's status.

8. Ms. Akuno for the respondents on her part submitted that it was the petitioner's actions or omissions to comply with the laid down rules and procedures in time which triggered the refusal of the respondent to extend her retirement age as per the Act. According to Counsel, the respondents while making the decision on whether to extend the petitioner's age of retirement as per the Disability Act, noted that the petitioner's medical examination/assessment was done on the 14th January, 2015 and her registration number obtained on 30th January, 2015 after being issued with a retirement notice on the 12th January, 2015. Ms. Akuno therefore argued that the omission by the petitioner to avail the required documents on time to determine her age of retirement is a procedural requirement laid down by law which the respondent cannot avert in her case. Counsel further submitted that the petitioner having claimed in her petition and application that she was diagnosed with an illness of nervous system disk which was surgically removed in 1988, she had never made any effort to get a medical assessment and membership to National Council for Persons with Disability. Counsel wondered why it took 27 years before the petitioner could apply to be registered and only did so after she was served with a retirement notice.

9. There appears to be no dispute that the petitioner was certified by a medial practitioner as a person with disability and subsequently registered as such. The bone of contention and which was raised by the respondents was the timing of the registration which appeared to coincide or was so proximate to the petitioners retirement as a person without disability that the respondent became of the view that it was an afterthought.

10. By a letter dated 12th January, 2015, the 3rd respondent informed the petitioner of intention to retire her from public service with effect from 8th September, 2015 upon attainment of 60 years mandatory retirement age.

11. On 6th January 2015 Dr. Thomas Ms. Adagala a Chiropractic Spinal Health Care Practitioner issued to the claimant a certificate detailing the petitioners medical condition of thoracic spine and cervical illness and chronic lower back pains since 1998. This certificate prompted the constitution of medical team on 14th January, 2015 comprising of Doctors D. Kariuki, Kabara Njoroge and Thurania to examine the petitioner and compile a person with disability medical assessment report. The doctors at the

conclusion of their examination recommended that the claimant be registered as a person with disability pursuant to section 7(1) (c) of the Persons with Disability Act (Cap 133). This was done by the NCPWD on 30th January, 2015 pursuant to its mandate under section 7 (1) (c) of the Act.

12. An attempt by the petitioner to have her records amended to defer her retirement age by another five years was refused by the 2nd respondent who advised the 3rd respondent to inform the petitioner accordingly. The reason for refusal as alluded to earlier seem to have been the proximity and coincidence in time between the letter dated 12th January, 2015 informing the petitioner of her retirement some eight or so months to come and her registration as a person with disability.

13. The preamble to the Persons with Disability Act provides as follows:-

An Act of Parliament to provide for the rights and rehabilitation of persons with disabilities, to achieve equalization of opportunities for persons with disabilities; to establish the National Council for Persons with Disabilities; and for connected purposes.

14. Part III of the Act contain the rights and privileges of persons with disability. These include duty by the government to take steps for the realization of rights of persons with disability, prohibition of denial of employment on grounds of disability, reservation of employment, education, health, accessibility and mobility and so on. The objects of the Act as it stands is to attempt to equalize persons with disability as far as possible with normal persons and mitigate the challenges persons with disabilities go through in their day to day lives. These rights were subsequently captured and are now an integral part of Kenya's Constitution under article 54 thereof.

15. Under the Act disability is defined as "a physical sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity which impacts adversely on social economic or environmental participation. Once a person has been certified to be one with disability as provided in the Act that person qualifies to be registered in accordance with section 7(1) (c) of the Act.

16. The Act does not make any provision on when a person must register once certified to be a person with disability. What the Court can deduce from this deliberate omission in the Act is that disability can either be congenital or as a result of subsequent illness or incidental injury. The latter aspect can occur to anyone at any stage in life. Therefore Parliament in its wisdom saw the mischief or injustice which would occur if timelines were set on when to register as a person with disability.

17. The respondent has raised issue with the timing of the registration of the petitioner as a person with disability contending it was an afterthought intended to extend her retirement age. The respondents however have not disputed the fact that the petitioner was certified by a medical team to be a person with disability and consequently registered as such. They have further not subjected the petitioner to a second opinion to verify the findings by the Kiambu Medical team.

18. Disability is physical sensory, mental or other impairment which adversely affects the person concerned in his or her social, economic or environmental participation. It exists as a fact whether registered or not. Registration is simply to create a database for purposes of operationalising the rights conferred by the Persons with Disability Act and the Constitution. It does not confer those rights which automatically exists once a person fits into the definition of disability contained in the Act.

19. The fact that the petitioner sought to be registered around the time she was due for retirement ought not to be read much into since it was within her right to plead her disability to continue in service as per government policy for such persons. As stated earlier if the respondent were doubtful about the petitioners disability nothing prevented them from seeking a second opinion on the finding of the Kiambu Medial team.

20. Article 20 (b) of the Constitution enjoins me as a Judge to interpret a right conferred or recognized by the Constitution in manner that most favours the enforcement of that right or fundamental freedom.

21. In conclusion the Court finds for the petitioner as follows:-

- a. **A declaration be and is hereby issued that the decision made by the 1st Respondent for the 2nd and 3rd Respondents disallowing the Petitioner from working as a Civil Servant of the Government of the Republic of Kenya until attainment of 65 years as unconstitutional, unlawful, null and void.**
- b. **A permanent injunction be and is hereby granted restraining the Respondents, their servants and agents from retiring the Petitioner from her present position and employment until her attainment of 65 years.**
- c. **There will be no order as to costs.**

22. It is so ordered.

Dated at Nairobi this 15th day of April 2016

Abuodha Jorum Nelson

Judge

Delivered this 15th day of April 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge