



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
PETITION NO. 23 OF 2012

CORPORAL JOHN KAMOTHO MURAGE CLAIMANT

Versus

ATTORNEY GENERAL 1ST RESPONDENT

COMMISSIONER OF POLICE 2ND RESPONDENT

THE COMMANDANT,

TRAFFIC POLICE DEPARTMENT 3RD RESPONDENT

M/S Oburu for the petitioner

Mr. Opodo for the respondent

JUDGMENT

1. The petition was filed on 24th November 2011 in which the petitioner prays for;
 - a. a declaration that the respondent's decision in purporting to remove the petitioner from the Kenya Police Force is arbitrary, unfair, discriminatory, unconstitutional and contrary to law;
 - b. a declaration that the respondent's action in purporting to remove petitioner from the Kenya Police Force contravene the petitioner's right to fair administrative action, is unconstitutional, null and void;
 - c. the respondent be ordered to pay the petitioner Kshs.20,000.000.00 on account of lost earnings until retirement taking into account the incidence of promotion and salary increment;
 - d. the respondent be ordered to pay the petitioner Kshs.30,000.000.00 in compensation and / or damages
 - e. costs;
 - f. any other / further order or relief that this Honourable Court may deem fit to grant.
2. The petitioner alleges that the respondent violated his right to fair administrative action contrary to Article 47 of the constitution. The petitioner further alleges that his removal from the Force was in violation of his right to fair labour practices embodied in Article 41 of the Constitution.
3. **Facts of the petition**

The petitioner's case is set out as follows;

- i. The petitioner was enlisted in the Kenya Police Force on 9th February, 1985.
- ii. On 9th May 1997, the petitioner was on duty driving a police vehicle along Webuye – Malaba road when they were attacked by armed robbers who shot at the petitioner causing him grave injury.
- iii. On 14th April 1999, the Medical Board made and presented a report to the Police Force in which the Board concluded that the petitioner was not fit to serve in the police as he had suffered severe injuries on both hands as a result of gunshot during the attack.
- iv. At the time of making the report, the petitioner had not fully recovered. The petitioner therefore wrote to the commissioner of police requesting to be retired on medical grounds.
- v. The Force declined to adopt the report of the Medical Board and decided against retiring the petitioner on medical grounds. As a result, the petitioner remained in the service of the police force.
- vi. In 2004, the petitioner was promoted to the rank of corporal.
- vii. In September 2005, the force transferred the petitioner from Eastern Province to Kasarani Division, Nairobi area in recognition of the need to have the petitioner serve the force while living with his family; as his fingers had been disfigured during the attack rendering it difficult for him to undertake domestic chores.
- viii. The petitioner served in Nairobi diligently and was commended by the Force for his dedication to serve.
- ix. On 24th December 2009, the petitioner received a signal from the OC Traffic, Nairobi area to the effect that the Commissioner of Police had approved his transfer from Nairobi Area to Rift Valley Province where he was to serve as a driver. This was despite the fact that the petitioner had not served as a driver since the attack and further notwithstanding the fact that the petitioner could not effectively serve as a driver following the attack.
- x. On 3rd January 2010, the petitioner wrote to the Commissioner of Police pleading to be allowed to serve in Nairobi close to his family for necessary care and help with domestic chores following the disability he had suffered in the course of duty.
- xi. Upon receipt of the letter, the Commandant, Traffic instructed that the petitioner's transfer to Rift Valley be withheld, until my plea was dealt with by the Traffic Department.
- xii. On 1st March 2010, the petitioner received a letter from the Kenya Police, Traffic Department Headquarters informing him that the Traffic Police Department wished to remove him from the Force on medical grounds '*provided under paragraph 30 Cap. 20 F.S.O.*'
- xiii. On 8th March 2010, the petitioner wrote responding to the letter as required. In his response, the petitioner emphasized the following matters:-
 - a. that the medical report the Traffic Department was putting reliance upon was made more than 10 years ago and could not be relied upon to determine the petitioner's current fitness or otherwise to serve in the force;
 - b. that the scars which remained following the said attack could not hinder the petitioner in the discharge of his duties as a traffic police officer;
 - c. that the intention to remove the petitioner from the force appeared unfair and discriminatory as several officers who had suffered more severe injuries continued to serve even after their removal had been recommended by the Medical Board.
- xiv. On 23rd March 2010 the Kenya Police Traffic Department Headquarters wrote purporting to remove the petitioner from the force on medical grounds.
- xv. The Kenya Police, Traffic Department acted arbitrarily, with caprice and in bad faith in purporting to remove the petitioner from the Force in that:-
 - a. the purported removal followed immediately upon the petitioner's request not to be transferred out of Nairobi and is an evident reaction thereto;
 - b. the injuries the basis of the petitioner's removal from the force 'on medical grounds' were suffered in the course of duty on 9th May 1997; some 14 years ago;
 - c. the subject injuries are long-healed and do not / cannot hinder the petitioner in the discharge of his duties as a police officer serving in the Traffic Department;
 - d. no fresh / current medical examination / report was undertaken by the Board or otherwise to found

- the petitioner's removal from the Force 'on medical grounds';
- e. The petitioner had served the force with distinction and diligence since 1997; and, had been appreciated in his work and promoted by the force, after the subject injuries. The decision to remove the petitioner from the Force offends the relevant Act and Orders.
 - xvi. The decision to remove the petitioner from the Force were taken without and or any due consideration of relevant factors and without any or any due hearing contrary to the rules of natural justice.
 - xvii. The decision to remove the petitioner from the Force has violated his right to fair administrative action contrary to Article 47 of the constitution.
 - xviii. The decision to remove the petitioner from the Force has violated his right to fair labour practices embodied in Article 41 of the Constitution.
 - xix. By purporting to remove the petitioner from the force as being unfit to serve on medical grounds, the force has eternally hindered and made it impossible for the petitioner to secure alternative employment.
 - xx. On the whole, the decision the subject matter of this petition is unfair, unjust and a violation of the petitioner's constitutional rights.
 - xxi. The decision impugned herein is ultra vires the law and procedure governing the process for retirement on medical grounds.
 - xxii. The decision the subject matter of the petition has caused the petitioner and petitioner's family grave mental torment and psychological trauma.
4. The petitioner filed documents in support of the petition which are attached to the petition itself and to the supplementary affidavit filed on 30th June 2012. The petitioner also filed witness statements on 17th March 2014. These constitute the evidence in support of the petition. The petitioner prays that he be granted the reliefs sought in the petition.

Response

5. The respondent filed a replying affidavit on 25th June 2014 sworn to by senior superintendent of police and a staff officer in the office of the Commandant Traffic Police Department, Mr. Julius Wanjohi. The case by the respondent as set out therein may be summarized as follows;
6. The claimant was enlisted to the police service as a police constable on 9th February 1985 and was subsequently promoted to the rank of corporal with effect from 6th January 2004.
7. On 9th May 1997 while on duty along Webuye Malaba Road, alongside others, they were attacked by armed robbers who shot at the petitioner causing him grave injury to his hands and shoulder.
8. As a consequence thereof and pursuant to the provision of section 3 of chapter 6 of the Force Standing Orders, the petitioner was subjected to Medical Board proceedings on the 14th April 1999.
9. The Board made a report declaring the petitioner '*not fit*' to serve due to the gun wounds and multiple fracture of the bones of the hands with extensive soft tissue damages on the right shoulder. At the time of the report, the petitioner had not fully recovered.
10. For this reason, the respondent decided to retain the petitioner in service until he was fully healed and subjected to further Medical Board assessment on his suitability for service.
11. The respondent admits that a lapse occurred and the petitioner was not retired at the recommended time as per the report of the Board.
12. Therefore, the petitioner continued to work with full remuneration and was even promoted to the rank of corporal thereafter.
13. The 3rd respondent deposes that the petitioner was amenable to be transferred like any other officer while he continued to serve and this did not violate any of his constitutional rights as alleged or at all. That section 1 of Chapter 23 of the Force Standing Orders on transfers states that;

"all ranks of the Force are liable to be transferred for service to any part of the Republic of Kenya".

14. The petitioner was therefore lawfully transferred from Traffic Headquarters Nairobi, to Rift Valley as a driver. Therefore, if the petitioner could not execute his duties as a driver he was liable to be retired on medical grounds and the respondent adopted that course of action.
15. The 3rd respondent admits that no second medical report was made to form a basis of retiring the petitioner 10 years after the initial report of the Medical Board.
16. The respondents state that the petitioner was paid due compensation as a result of the injuries sustained but the petitioner has not yet collected his terminal and retirement benefits which are ready for collection upon application.
17. The respondents while admitting negligence in the manner the case was handled pray that the petition be dismissed with costs.
18. **Determination**

- i. Was the decision by the respondent to retire the petitioner on medical grounds based on a medical board report done 10 years earlier a fair administrative action and / or a fair labour practice?
- ii. Is the petitioner entitled to the reliefs sought?

Issue i

19. The facts of this case which are common cause show that the petitioner suffered gun injuries in the course of duty on 9th May 1997. On 14th April 1999 the Medical Board recommended that the petitioner be retired on medical grounds.
20. The respondents however made a decision not to retire the petitioner and put him on traffic duties at Nairobi while he was staying with his family who performed his domestic chores since his hands had been injured and had not recovered fully. It is a fact that the family was an essential support to the petitioner in this respect.
21. The petitioner did his work well and was promoted to the rank of a corporal on 6th January 2004, seven years after the date he sustained injuries.
22. The respondents admit that no further medical examination and report was made by the Medical Board in respect of the petitioner after the injuries had healed. The petitioner's level of disability was therefore not objectively assessed after he had recovered from the injuries.
23. On 24th December 2009, the petitioner was vide a signal transferred from OC Traffic Nairobi Area and transferred to Right Valley Province to serve as a driver.
24. On 3rd January 2010, the petitioner wrote to the Commissioner of Police pleading to be allowed to serve in Nairobi close to his family in view of his disability to perform domestic chores. The Commandant, Traffic instructed the transfer be withheld until the plea by the petitioner was considered.
25. The decision by the respondent to retire the petitioner on medical grounds in terms of paragraph 30 (c) Cap. 20 F.S.O. without any further reference to him and in total disregard of the personal circumstances of the petitioner is in the court's considered view not fair administrative action as provided under Article 47 of the constitution.
26. The court has arrived at this decision in view of the fact that, the decision was not supported by any recent and valid report of the Medical Board having assessed the ability of the petitioner to perform police duties. Secondly, between the date of the accident on 9th May 1997 to 1st March 2010, about thirteen (13) years had lapsed and it was about ten (10) years from the date the Medical Board had examined the petitioner admittedly, while his wounds were fresh and had not fully recovered.
27. The respondents rightly declined to implement the report of the Medical Board then, to retire the petitioner on medical grounds and the respondents were in fact and law estopped from retiring the petitioner 10 years later, without any medical basis, on medical grounds.
28. The court further finds that the action by the respondent was in violation of Article 41 of constitution of Kenya 2010 and amounted to unfair labour practice in that, the decision had no medical or legal basis and was in effect abuse of office and power by the respondent to the loss and detriment of the petitioner.
29. In this decision I am fortified by the decision of Mbaru J. in **Industrial Court of Kenya, of Nairobi, cause No. 2408 of 2012, Antony Kiploril Sang –vs- The Hon. attorney General** in

which the court relied on Article 47 to the effect;

“(i) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

Found that the decision of the Medical Board of the Police service to retire the disabled claimant on medical grounds did not meet the threshold set under this Article and was therefore unlawful and a violation of the right of the claimant to fair administrative action.

30. In this case, not an iota of evidence was adduced by the respondent to show that the petitioner was unfit to perform traffic duties which he had performed for 13 years since he was shot by robbers in the cause of his service.
31. The decision to retire the petitioner is inferred to have been actuated by his appeal not to be transferred and continue to stay in Nairobi, near his family for medical reasons while he served the police service. The respondent did not respond to the Appeal by the petitioner but instead retired him from service. The court reads in this bad faith on the part of the respondent.
32. Accordingly, court finds that the petitioner has proved his case on a balance of probabilities and is entitled to the reliefs sought in the petition.

Issue ii

33. The petitioner seeks payment of lost earnings from the date of termination to the due date for retirement in the sum of Kshs.20,000,000. The petitioner further seeks compensation and / or damages in the sum of Kshs.30,000,000.
34. From the record of the petitioner, he was about 45 years on the date of retirement. He still had about 15 years to serve the police force. The petitioner had served the force from 1985 to 2010 a period of about 25 years. The petitioner was injured seriously in the course of his service but continued to serve for a further 13 years while suffering limited disability.
35. The petitioner had not gotten alternative employment as at the time of hearing this suit and it is possible that he may never obtain another employment in view of his disability.
36. In the case of **Antony Kipkorir Sang, (Supra) Mbaru J.** in a case which has similar facts to the present one, awarded the claimant Kshs.3,000,000 for unlawful early retirement from the force on medical grounds.
37. The **Court of Appeal in Civil Appeal No. 79 of 2012, Peter M. Kariuki Vs. Attorney General** stated at page 43.

“ it bears repeating that assessment of amount of damages is a matter for the discretion of the trial Judge which must be exercised judiciously and with regard to the general conditions prevailing in the country and to prior relevant decisions.”

38. The court relied on the case of **Cuosseus Vs. Attorney General (1999) EA 40**, a decision of the Supreme Court of Uganda thus;

“..... the object of an award of damages is to give an injured party compensation for the damages, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury.”

39. This is not an enviable task given the variables and immeasurables in each case. I am however, well guided by the principles enunciated by the court of Appeal Judges above.
40. It is not easy to place the disabled petitioner in the same place as he was before he lost his job up to the due date of retirement without reinstating him to his job with full salary and benefits until date of retirement. However, it is not prudent to reinstate the petitioner to his job in the circumstances of the case and in any event he has not specifically pleaded that he be returned to his job. I would in the circumstances award the claimant a sum that would almost place him in the employed state to the date of retirement at 60 years.

41. Accordingly, I award the claimant general damages in the sum of Kshs.4,000,000.00 (four million).

42. In the final analysis, the court makes the following final orders;

- i. the respondents' decision in purporting to remove the petitioner from the Kenya Police force is arbitrary, unfair, unconstitutional and contrary to law;
- ii. the respondents' action in purporting to remove the petitioner from Kenya Police Force contravened the petitioner's right to fair administrative action and fair labour practice, is unconstitutional, null and void.
- iii. the respondents are ordered to jointly and severally pay the petitioner Kshs.4,000,000.00 (four million) general damages for the loss and damage suffered;
- iv. the award be paid with interest from the date of filing suit till payment in full.
- v. the respondents to pay costs of the suit.

Dated and delivered at Nairobi this 6th day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE