



**Sang v Attorney General (Cause 2408 of 2012)
[2014] KEELRC 752 (KLR) (6 February 2014) (Judgment)**

Anthony Kipkorir Sang v Attorney General [2014] eKLR

Neutral citation: [2014] KEELRC 752 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 2408 OF 2012

M MBARŪ, J

FEBRUARY 6, 2014

BETWEEN

ANTHONY KIPKORIR SANG CLAIMANT

AND

ATTORNEY GENERAL RESPONDENT

Retiring a police officer on medical grounds due to an injury sustained in line of duty without considering the possibility of reasonably accommodating him/her is a violation of his/her rights

The claimant had been sent on early retirement on medical grounds as a result of injuries sustained in the course of duty. The court held that the Commissioner of Police had violated the claimant's rights under article 27 of the Constitution of Kenya, 2010, on equality and freedom from discrimination by retiring the claimant on medical grounds without taking into account the possibility of reasonably accommodating him.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms - equality and freedom from discrimination - right to human dignity - discrimination against people with disabilities - entitlements of persons with disabilities - justification for retirement of employees on medical grounds as against retirement on disability - whether termination of employment of a police officer on ill-health grounds due to an injury sustained in line of duty was a violation of his/her rights - Constitution of Kenya, 2010, articles 27 and 54.

Brief facts

The claimant, (a former GSU Officer) filed a claim against his employer (Kenya Police Service) for termination of his employment and discrimination on the grounds of disability sustained during his course of duty. He sought a declaration that the act of sending him on early retirement on the basis of disability was discriminatory and that his rights to be treated with dignity under article 28 and 54 of the Constitution of Kenya, 2010 were violated.



Issues

- i. Whether termination of employment of a police officer on ill-health grounds due to an injury sustained in line of duty was a violation of his/her rights.
- ii. Whether there was justification for retirement of employees on medical grounds as against retirement on disability.
- iii. Whether there were remedies available to an employee terminated on grounds of ill-health as a result of injuries sustained during the course of work.

Held

1. Fundamental rights and freedoms were not absolute. There were boundaries set by the rights of others and by the legitimate needs of the society. The claimant was not entitled to orders for compensation, reinstatement and payment of salary. By virtue of him being a Member of the Police Force, he could not seek for unfair termination under the Employment Act, 2007 that found its footing in article 41 of the Constitution of Kenya, 2010. There existed a limitation that had a reasonable justification that could find justification in an open and democratic society to warrant the application of the limitations as listed under article 24 of the Constitution of Kenya, 2010.
2. The claimant was retired on medical grounds and not due to his disability. However, every person whether with a medical condition or with a disability had a constitutional protection as a vulnerable person due to ill-health or medical condition. There ought to be no discrimination directly or indirectly due to one's status based on any condition or on the basis of any disability. Such a person enjoyed equal protection and equal benefit of the law. Parts of those enjoyments were the fundamental rights and freedoms to be treated equally and fairly in all spheres of life.
3. The Police Force Standing Orders ought to be seen and addressed in the context of the Labour Laws, 2007, the Constitution of Kenya, 2010 and the Convention on the Rights of Persons with Disabilities with regard to non-discrimination provisions. Discrimination was outlawed and could not be justified whether on ground of disability or health status or any other status.
4. Employment was not just a source of livelihood but something that defined one's self-worth or dignity. A job was a status, reputation, a way of defining one's self-worth and worth in a community. It was also essential to financial security and offered assurance of future income needed to repay present debts and meet future obligations. In the modern economy, employment was central to one's existence and dignity. That sentiment was consistent with the right to dignity guaranteed by article 28 of the Constitution of Kenya, 2010.
5. The claimant had specifically trained for a job in the Police Service and suffered disability at a prime age while on duty. Hence, to deny him the opportunity to carry on police duties when he was able to do so amounted to violation of his dignity.
6. The Police Service possessed the economic power, facilities and logistics for accommodating the claimant's condition by assigning him alternative duties. The Police Service also had a constitutional duty to take measures to reasonably accommodate an officer with a disability without having to suffer any undue hardship or prejudice.
7. The claimant, as an officer who was essentially normal had more to offer to the respondent service because he continued to work at the respondent's clinic after treatment. That kind of work of keeping patients records did not require any special skill and if it did, the respondent had the resources to facilitate the claimant's skill.
8. Under the Persons with Disabilities (Access to Employment, Services & Facilities) Regulations, 2009, rule 12 forbade any public service establishment from dispensing with or reducing in rank an employee merely on account of disability. The rules also provided for transfer of an employee to some other suitable post he was holding. The above efforts were not left at the discretion of an employer but they were constitutional and statutory safeguards to protect persons with disabilities against discrimination on the basis of their disability.



9. The respondent's act of denying the claimant the opportunity to carry out his police duties where he was able, taking into account that he suffered the disability at his prime age while on duty, amounted to violation of his dignity as enshrined under article 28 of the Constitution of Kenya, 2010.

10. The Commissioner of Police violated the claimant's rights under Constitution of Kenya, 2010, article 27 on equality and freedom from discrimination by retiring the claimant on medical grounds without taking into account the possibility of reasonably accommodating him.

11. Under section 12 of the Industrial Court Act, 2011, the court could grant orders as to damages to ensure that the rights infringed were vindicated and hence the claimant was entitled to damages for constitutional and statutory infringement.

General damages of Kshs.3, 000,000 awarded.

Citations

East Africa

1. *Marete, DK Njagi v Teachers Service Commission* Cause No 379 of 2009 - (Explained)

2. *Anupa, Paul & another v Attorney General & another* Petition No 93 of 2012 - (Followed)

South Africa

1. *Public Servants Association of South Africa v Ministry of Safety and Security & South African Police Service* [2009] ZALC 128 - (Followed)

United States of America

2. *Cuiellette v City of Los Angeles* (2011) 194 Cal App 4th 757 1 - (Mentioned) Statutes

East Africa

3. Constitution of Kenya, 2010 articles 1,2(6); 10; 19(3);20;21;24(5) (6); 27(4);28; 41(1)(2)(b); 47(2);54(1)- (Interpreted)

4. Constitution of Kenya, 2010 Sixth Schedule section 7(1) - (Interpreted)

5. Disabilities Act, 2003 (Act No 14 of 2003) section 15(2)(6) - (Interpreted)

6. Employment Act, 2007 (Act No 11 of 2007) sections 2, 3(2)(b) - (Interpreted)

7. Industrial Court Act,2011 (Act No 20 of 2011) section 12 - (Interpreted)

8. National Police Service Act, 2011 (Act No 11A of 2011) - In general - (Interpreted)

9. Police Act (cap 84) (Repealed)-In general - (Interpreted)

10. Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 (Act No 14 of 2003 Sub Leg) -In general - (Interpreted) International Instruments

1. Convention on the Rights on Persons with Disabilities (CRPD), 2006 article 1 Advocates

2. *Chigiti & Chigiti* for the Claimant

3. *Culent SLunyolo-Okwara for Respondent*

JUDGMENT

1. On November 29, 2012 the claimant Anthony Kipkorir Sang filed his claim against his employer Kenya Police Service represented by the respondent for termination of his employment and discrimination on the grounds of disability. The respondent through the office of the Attorney General as the government legal advisor, filed their defence dated December 19, 2012, admitting that the claimant was an employee of the Kenya Police Service who issued the claimant with a notice of their intention to retire him on grounds of ill health in view of medical board findings and in accordance with the Force Standing orders chapter 20, and Code of Regulations on which basis the claimant was found unfit for further service and hence removed from the Kenya Police Service. At the hearing, the claimant gave his sworn



evidence while the respondent called Silas Gichungi, an Administrator with the General Service Unit, of the police service. At the close of the hearing, both parties agreed to file their written submissions dated October 9, 2013 and October 11, 2013 for the claimant and respondent respectively.

Claimant's Case

2. The claimant in his memorandum of claim stated that on September 1, 1997 was employed by the Kenya Police as Police Constable No 72334. On April 17, 2002 while on duty as an escort officer, the claimant was ambushed by thugs who shot him on his left scapular region as a result of which he suffered spinal cord injuries for which he was admitted at Forces Memorial hospital. He was discharged on November 18, 2003. On September 25, 2006 a medical board under the Ministry of Health reviewed the claimant and made a finding that all his systems were normal with remarkable improvement save for the fact that he was on a wheel chair. On September 27, 2010, the Commissioner of Police (COP) issued notice to the claimant of their intention to retire him on medical grounds. On October 12, 2010, the claimant replied to the COP seeking to be allowed to serve the Kenya Police in the capacity of any office work so as to be retained in the police force. On December 17, 2010, the COP sent the claimant on retirement on medical grounds with effect from January 17, 2011. At the time of this retirement the claimant was serving at the police force clinic and his provided residence was restructured by setting up of a ramp at the kitchen and toilet.
3. The claimant further stated that under article 10 and 27(4) of the Constitution that sets national values and principles he was discriminated against on the basis of his disability and further that under article 41(1) he was not provided with a fair Labour practice that require every worker to reasonable working conditions. That under article 54(1) a person with a disability is entitled to be treated with dignity and respect and to be addressed in a manner that is not demeaning, and the Respondent has violated these constitutional provisions. Further that under the Persons with Disabilities Act, no person with a disability should be denied access to opportunities for suitable employment where they are qualified and any differential treatment due to disability is discrimination. Where possible an employer should make adjustments to reasonably accommodate a person with a disability.
4. The claimant also stated that he was discriminated against contrary to section 27(4), 28, 29, 41(1) and 2(b) and 54(1) of the Constitution. The claimant further stated that while he was in service he took two loans with banks which were secured by his pay slip and due to the pre-mature retirement he was unable to service a loan amounting to Kshs 807, 000.00 with Equity Bank and another with Kenya Commercial Bank for Kshs 200, 000.00 which loans were outstanding. That he has a young family and was the sole bread winner. That the respondent in terminating the claimant from his employment on grounds of disability and failure to engage him in other capacities factoring his disability were acts of discrimination.
5. The claimant is seeking for a declaration that the act of sending him on early retirement by the respondent on the basis of disability is discriminatory and offends article 27(4) of the Constitution; a declaration that his rights under article 41(1) were violated; a declaration that his rights to be treated with dignity under article 28 and 54(1) were violated; a declaration that section 15 of the Persons with Disabilities Act and article 1 of the Convention on the Rights on the Persons with Disabilities were violated and thus he should be paid his salary from January 17, 2011 to the date of judgement and in the alternative the court to make an order directing the respondent to pay the claimant sums equivalent to his unexhausted statutory working years until the age of retirement at 60 years; compensation for the termination and any other orders that the court may deem fit to grant. These are outlined as follows:



- a. A declaration that the act of sending him on early retirement by the respondent on the basis of his disability amounts to an act of discrimination against the claimant and that it offends article 27(4) of the Constitution;
 - b. A declaration that the claimant's rights and guarantee for fair labour practices and a reasonable working conditions under article 41(1) and (2)(b) have been violated, remain violated by the respondent;
 - c. A declaration that the claimant's right to be treated with dignity as provided for under article 28 and 54(1) of the Constitution has been and remain violated and threatened by the respondent;
 - d. A declaration that the respondent has violated and continues to violate section 15 of the Persons with Disabilities Act as well as article 1 of the Convention on the Rights of Persons with Disabilities;
 - e. The full salary with effect from 1 January 7, 2011 to the date of the Judgement at Kshs 31,135.00 per month;
 - f. An order reinstating the claimant to a sedentary position within the forces;
 - g. In the alternative, an order do issue compelling the [respondent to] pay the claimant a sum equivalent to the unexhausted statutory working years until the age of 60 as a guarantee under section 15) of the PWD Act at Kshs 31,135 per month;
 - h. Compensation; and
 - i. Any other order and or directions that this court may deem fit to grant.
6. In evidence, the claimant gave his evidence that he was employed by the General Service unit as No 72344 as Police Constable. On April 17, 2002 at 2 am the Claimant was taking staff of Kenya Broadcasting Corporation (KBC) home as he had been assigned by his employer to do in the course of his work. On the way while driving the KBC staff, at Mwiki they were ambushed by thugs and in a gun exchange the claimant was hit with a bullet and injured with several injuries to the spinal code. He was taken to Forces Memorial Hospital where he received treatment. The treating doctor wrote a report on November 30, 2010. There was a review and he was later sent to the Medical Board who also wrote a report noting that the claimant had limited mobility and on wheel chair but he could do his duties.
7. After treatment, the claimant resumed his duties with the respondent and for 6 years he continued in service. He was placed at GSU dispensary at Ruaraka where he was recording patient cards while the patients were attended to by another colleague. He did this job while seated and had no difficulties. He was able to get a wheel chair from Association of Persons with Disabilities in Kenya (APDK) [a non-governmental organization] as his employer said they did not have a financial vote to buy a wheel chair for him. This wheel chair has been an assistive device to the claimant to do his duties. In the claimant's house given by the respondent and in his office, the respondent fixed a ramp to facilitate his access. This was also done to his kitchen and toilet and he had access and could operate with minimum support. However, the claimant was terminated on the grounds of ill-health. The notice of termination came through the respondent's commandant on September 27, 2010 and on December 16, 2010 the Commandant had recommended that the claimant be removed from his employment. The claimant lodged an appeal to the COP noting that he was still able to do his job and seeking reinstatement but there was no response. The Commissioner wrote to the Prime Minister's office instead of making a reply to the claimant in a confidential communication which was wrong as this was making a disclosure of material facts to a 3rd party without the consent of the claimant.



8. The claimant lodged a claim with the Labour officer where he was awarded Kshs 438, 900.00 under the Workman's Compensation Act and he was advised to take the award and leave his employment. That he had many years before he could retire. He was still young in service aged 35 years at the time. Had a wife and children who sorely depended on him. His son was in a private school and had to drop. This affected the child as both wife and child have to watch their provider waste away hence causing distress to them and to the claimant. At home, the claimant was known as an independent person but now his friends see him as a different person. He was a well-respected police officer but this has changed affecting his social status. The claimant was developing himself while at work and had taken a loan with Equity bank and KCB using his pay slip but was forced to default after the termination. The interest is now high and the claimant is not able to repay it and has to constantly hide to avoid being put into more damage.
9. While the claimant was serving at the respondent, there were colleagues who got injured while at work. One such colleague is at Logichogio and another in Kitengela who is blind and still serving and like them, the claimant can still give service to the respondent. Despite the disability the claimant can drive as he has been running a taxi business. The respondent has Force Standing Orders which are used and applied for the Police but they are not above the law or superior to the Constitution and thus this court should protect the rights of the claimant. He was not supposed to be terminated under Standing Orders. He had no disciplinary case and should not have been terminated. He was young and as a person with a disability he should be allowed to serve until age 65.
10. The claimant is seeking reinstatement to be able to work and serve his family and to leave a life of dignity. He can do finger printing or other duties that the respondent has. He is also seeking compensation for time lost. The claimant is also seeking damages for being treated unfairly. He was undergoing physiotherapy but had to stop due to lack of medical cover once employment was terminated. At the time of retirement, the claimant was earning Kshs 32, 000.00 per month.
11. On cross-examination the claimant confirmed that he was treated at Forces Memorial Hospital where the respondent paid but he was forced to stop treatment after the termination. After leaving hospital he was allocated work at the GSU clinic and the officer responsible made a directive for the fixing of ramps at the office and house used by the claimant as part of the support given by the Respondent.

Respondent's Case

12. In response to the claim, the respondent stated that the claimant was employed by the Kenya Police and the Commissioner of Police notified the claimant of his intention of retiring him from the Police service on grounds of ill health based on the medical board findings and in accordance with the Forces Standing orders chapter 20(30)(c) and Code of Regulations. In view of the medical board findings with regard to the claimant where he was found unfit to serve, the Commissioner of Police therefore had him removed from service on medical ground. The claimant was not retired for being a person with a disability but for being medically unfit for service. The claimant was paid Workmen's Compensation amounting to Kshs 438, 900.00 and hence he is not entitled to all the claims or reinstatement.
13. In evidence, the respondent called Silas Gichungi an officer with the GSU in the administration department having worked with the Police Service since 1984. That he is conversant with the claim and the defence and that in April 2002 the claimant with other officers were stationed at KBC where they were to pick workers from their homes and take them to work. While waiting for the KBC workers at Mwiki, they were attacked where the claimant was seriously injured. He was taken to Forces Memorial Hospital where he was admitted for over one year. When he was discharged in November 2003, he was taken back to the Police camp as he had clinics to attend. From 2003 to the time of retirement in



- 2010, the claimant was not working as he was not given any duties as he could not cope. He continued receiving his salary all this time. Before he was in operational duties which are rigorous to the extent that a person in his condition cannot cope.
14. Mr Gichungi further stated that, some things are not in the Police Force. There are no guidelines by the police to cater for persons with disabilities. The ramps put in the claimant's house were an initiative by his colleagues. The Commandant allowed these changes to ease his access to the kitchen, bedroom and other rooms. The claimant was not discriminated against as the recommendation to have him retire on medical grounds was from the Medical Board which convened in 2006 through the Commissioner of Police. The Commissioner of Police asked the medical board to convene before any decision on the claimant could be taken. The Commissioner of Police acted on the basis of the board recommendations that stated he was seriously injured and confined to a wheelchair for life and should be retired on medical grounds. The claimant was therefore found unfit for service and as required by Force Standing Orders, the COP wrote to the claimant that he would be retired as he could not be deployed anywhere else within the GSU which is an operational unit that is required to respond to emergencies anywhere in the Country and this is not conducive for a person with a disability. Officers live in tents and go to areas which have no basic amenities and thus require people who can independently take care of themselves as well as help those on the ground. Most locations where officers serve are outside Nairobi and the terrains are rough. In Nairobi there are 3 offices where one can work but in the case of the claimant it was not possible to place him as all the officers in these Nairobi offices are on standby and if anything were to happen, the office is closed and all have to respond. There is no vacancy at the moment.
 15. Mr Gichungi further stated that the recommendation by the claimant that he could come in the Criminal Investigations Department is not possible as Criminal Investigation Department and GSU conditions are different and not possible for the claimant to be so placed. The recruitment of GSU officers is specific where one must meet minimum conditions/criteria especially being physically fit, good physique and medically fit that is hearing, eye sight and good height. These are found as good conditions as the Police work requires action to arrest and do duties to protect life and property as well as undertake vital installations hence physical fitness becomes a necessity. The claimant being on a wheelchair could not undertake these duties.
 16. The claim that the claimant be reinstated is not possible unless things are changed to accommodate him. There is no vacancy yet where the claimant can be reinstated. Once an officer is retired on medical grounds he gets pension and workmen compensation due to any injury. The claimant is not the first officer to be retired on medical grounds as other senior officers have been retired from service.
 17. On cross-exam, Mr Gichungi confirmed that under the GSU officers are retired as per the Police Standing Orders on 3 main grounds; that is when an officer is 55 years of age or the current increase to 60 years; after recommendation by the Medical Board or on one's choice. The claimant was retired based on the Medical board recommendation as he was not 60 years old and he did not apply to retire early. He also confirmed that the Police Force has not taken any measures to accommodate persons with disabilities as persons within their employ. When officers are undergoing training, there are no trainees with a disability and this is not included in the training curriculum. When the possible trainees are being recruited, one major condition they have to meet is that one is physically fit. Once the officers are trained, they get into accidents but there are no legal guidelines on how to deal with such officers.
 18. The witness further confirmed that the claimant can be deployed as a police driver but the Force Standing Orders have not been amended to make such accommodations. These are now under review pending completion.



Submissions

19. In submissions, the claimant filed a long list of authorities without an outline as to how they relate to the claim. It is not just enough to attach the list with highlighted sections; relevance of each attached document to the case must be outlined for these submissions to be of relevance to the case at hand.
20. The respondent on the other hand submitted that the claimant was removed from the Kenya Police Service under medical grounds which ground was not the same as removal from service on the basis of disability. When the claimant was shot at on April 17, 2002 he was in hospital until November 18, 2003 when he was discharged and taken to the GSU camp to recuperate. He was never assigned any duties due to his condition. He was not assigned to work at the Police clinic as he had no such training but remained in the payroll. The retirement was on medical grounds according to laid down procedures where; the claimant was taken before the Medical Board on July 13, 2006 which made a finding; based on this medical board report, on September 27, 2010 retirement notice was issued by the COP; and on December 16, 2010 the claimant was removed from service on medical grounds.
21. The respondent also submitted that the claimant was retired based on force standing orders where an officer may be retired if found to be mentally or physically unfit for service in the force and that under article 24 of the Constitution a right or fundamental freedom under the Bill of Rights may be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors. In this case, the COP acted in accordance with the Police Act and the Kenya Police Standing Orders which put reasonable limitations on rights of persons with disabilities in terms of requiring the Commissioner to recruit and retain persons who are physically and mentally fit. These limitations are reasonable due to the rigorous nature of police training and duties. The claimant was not discriminated against as he remained in his duty station and on the payroll before he was retired. There was no indignity in this case. The medical review was undertaken by the medical board under the Ministry of Health where the board noted that the claimant had made remarkable improvement save for the fact that he was confined to a wheelchair.
22. On the claims, the respondent submitted that the claimant was not retired due to his disability but on medical grounds and therefore it is wrong to claim there was discrimination against him. Fair procedure was followed in this case. On the claim that article 41(1) of the Constitution was violated, the respondent noted that article 24(5) provide of limitation of rights in accordance with the law and in this case the National Police Service Act apply with regard to the application of article 41. The claimant being an officer of the disciplined forces, article 41 did not apply to him. The claimant was treated with dignity at all times since he got injured and was awarded his workman's compensation and therefore nothing arises with regard to claimant's claims under article 28 and 54 of the Constitution.
23. That the claimant was retired on medical grounds and section 15(2) of the Persons With Disabilities Act does not apply to warrant any compensation. The claim for full salary from January 17, 2011 to date does not arise as employees are paid for work done and the claimant was not in service since January 17, 2011. He cannot be paid for a period not worked. The claimant was terminated after notice was issued to him. On the claim for reinstatement, the respondent submitted that the claimant was under a contract of service and cannot be forced back on the Respondent as that would be tantamount to forcing an employee on an employer. That the claimant statement that he can be a driver of a modified vehicle is not possible as this would impose undue burden on the respondent. There is no vacant position where the claimant can be re-assigned due to his qualifications. To accommodate a person with disability is not equivalent to creating a new job or moving another employee or promoting him thus violating another employee's right. There must be an existing vacancy.



24. The alternative claim that the claimant should be paid for the remainder of his working years is denied based on the fair go all round principle where the court must balance the interests of the employer and that of the employee as the purpose of any employment compensation is not to unjustly enrich any party but to redress that injustice. Reference was made to the case of *DK Njagi Marete v the Teachers Service Commission* [2013] eKLR where the court held that the employment remedies must be proportionate to the economic injuries suffered by the employees. Remedies are not aimed at facilitating an unjust enrichment of an aggrieved employee but must be made in a proportionate way.

Issues for Determination

Whether there was a violation of the claimant's rights Whether there is justification for the retirement of an employee on medical grounds as against retirement on disability Whether there are any remedies available to the claimant

25. This claim has a long history starting from April 17, 2002 when the claimant was injured while in police Service and was eventually retired on medical grounds on September 27, 2010. This retirement on medical grounds is the main basis of this claim. This claim must therefore be looked at with these facts in mind. The respondent submitted that the claimant was retired in accordance with laid down Forces Standing orders which at regulation 30(c) state;

Any inspector may be removed from the Force by the Commissioner of Police and any subordinate officer may be removed from the Force by the Commissioner or Provincial police Officer for any of the reasons set hereunder:

- (c) If he/she is certified by a medical officer to be mentally or physically unfit for further service in the force

26. However, under the *Police Act*, cap 84 Laws of Kenya, Force Standing Orders are only made under specific provisions as under section 5:

The Commissioner may issue administrative orders, to be called Force Standing Orders, not inconsistent with the *Constitution* or the provisions of this Act or any other regulations made thereunder, for the general control, directions and information of the Force. [Emphasis added].

27. On the other hand, as the respondent cited regulation 30(c) of Chapter 20 the Forces Standing Orders which provides;

Any Inspector may be removed from the Force by the Commissioner of Police and any subordinate officer may be removed from the Force by the Commissioner of Police or Provincial Police Officer for any of the reasons set hereunder:- 1(c) If he/she is certified by a medical officer to be mentally or physically unfit for further service in the Force. [Emphasis added]

28. Hence under regulation 30(c) an officer may be removed from the Police Service if he is certified to be medically unfit for further service in the Force and not unfit for any other duties that could alternatively be allocated to him. In the case of the claimant, he served at the Police clinic for over 6 years. From these extracts from the Force Standing orders therefore, the role of the Medical Board is to make particular certifications which are to guide on the decision of the COP with regard to serving officers and hence the decision as to whether an officer should be retained or terminated or retired rests with the COP after various considerations.

29. Further, the force Standing Orders cannot go contrary to written law or the *Constitution*. To do this, they will be found to be null and void. Therefore, where an officer is found unfit for recruitment or



retention in the force, whatever regulations or orders that regulate such recruitment or retention must adhere to constitutional and statutory safeguards. In this case, Mr Gichuri for the respondent stated that the recruitment of police officers and those to the GSU is a rigorous exercise as those offering themselves for such recruitment must meet pre-set conditions that include being physically fit and of good physic. However such physically fit and people of good physic once recruited do get injuries like the claimant. The Force Standing Orders have no pre-set regulations on how to deal with such previous physically fit and people of good physic once they have disabilities. It seems the only way to address such officers is to have them referred to the Medical Board for review and the COP uses this report and recommendations to retire such officers on medical grounds. I find this most absurd. The COP has a statutory and constitutional duty to go beyond the medical board report. Each officer's case must be addressed on its own as circumstance differs based on the nature of abilities each person has. It is not the medical condition or the nature of the disability that should be the centre of focus, rather the individual abilities should be. In the claimant's case, despite his disability, he has demonstrated that he is of various abilities that were put into good use while serving with the Police Service and after he was retired on medical grounds. He runs a business as a taxi driver as he can drive a modified vehicle. This skill and ability is being put into good use. With reasonable accommodation, a person with a disability can serve in various capacities.

30. Looking at the claims, the claimant has based part of his claims under article 41 of the Constitution. My reading of the constitutional provisions in this context is that the Constitution under article 41 has created a new regime within which all labour relations must be addressed that of fair labour practices. Under article 41(2);

- “(2) Every worker has the right—
- (a) To fair remuneration;
 - (b) To reasonable working conditions;
 - (c) To form, join or participate in the activities and programmes of a trade union; and
 - (d) To go on strike.”

31. These constitutional provisions are part of the wider concept of what constitute fair labour practices and part of the Bill of Rights and fundamental freedoms enshrined in the basic law of the land. These provisions are further expounded by statutory provisions with regard to how employers and employees are to govern their relationship while at the workplace to ensure that there are pre-conditions to what is fair, reasonable and just. Employers are also encouraged to set in place policy guidelines as a further elaboration of constitutional and statutory provisions to enable employees appreciate the workplace conditions, their rights, duties and responsibilities all geared towards the promotion of fair labour practices. It must however be noted that all these constitutional, statutory and sector provisions and practices do not come easy, there are long struggles that have their historical foundations culminating in what the International Labour Organisation (ILO) has now codified into conventions and labour regulations. Further to the ILO work, member countries have made constitutional and statutory provisions guided by policy to ensure fair labour practices at the workplace and other labour relations.
32. Therefore without exception, the application of fair labour practices are part of our statutes, based on the Constitution, the ILO and other international mechanisms to which Kenya is bound by virtue to article 2(6) of the Constitution. This is the template within which any employee whether under Police Service or otherwise is bound. That they are covered within the realm of fair labour practices.



33. These constitutional, statutory and other rights are however not a free for all. They are subject to limitations as constitutionally established under article 19(3);

- “(3) The rights and fundamental freedoms in the Bill of Rights—
- (a) Belong to each individual and are not granted by the State;
 - (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this chapter; and
 - (c) Are subject only to the limitations contemplated in this Constitution.” [Emphasis added]

34. These limitations must have a basis that is constitutional. There are parameters or yardsticks outlined under article 24 of the Constitution that are important to reiterate here;

Taking into account all relevant factors, including— “(a) The nature of the right or fundamental freedom;

- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

35. Fundamental rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society. Generally, it is recognized that public orders, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Thus article 24 of the Constitution sets out specific criteria for the restriction or limitations of the Bill of Rights. A limitation therefore becomes justifiable if it has already been contemplated in a particular scenario or based on outlined circumstances. A law that creates a limitation is an intrusion of that right. However, this intrusion or infringement is not unconstitutional if it takes place for a reason that is recognized as a justification for intrusion or infringing rights in an open and democratic society based on human dignity, equality and freedom. Not all infringements of fundamental rights are unconstitutional. Where an infringement can be justified in accordance with the criteria in article 24 it is constitutionally valid. Therefore, there must be a justifiable reason that can find justification in an open and democratic society to arrant the application of the limitations as listed under article 24 of the Constitution. These are as outlined under article 24(5) which states;

“Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

- (a) Article 31—Privacy;
- (b) Article 36—Freedom of association;
- (c) Article 37—Assembly, demonstration, picketing and petition;
- (d) Article 41—Labour relations;



- (e) Article 43—Economic and social rights; and
- (f) Article 49—Rights of arrested persons.”

36. There can be derogation on the above outlined provisions where there is justification. Under article 24(5)(e) article 41 is specifically been singled out with regard to the claimant’s claim. There is a statutory justification as well where under the Employment Act section 3(2)(b) where the Act does not apply to employees under the Kenya Police, just like the claimant was under the Kenya Police Service and part of the disciplined or armed forces. There are therefore constitutional and statutory justifications as to why the claimant cannot therefore seek as under the Employment Act for unfair termination claim that would find footing in article 41. There exists a limitation that has reasonable justification. This court can therefore not make orders for compensation, reinstatement, salaries since retirement or up to the expected retirement age to the claimant. These are the prayers in the claim outlined as prayer ii), v), vi), vii), and viii). These are claims outlined under the Employment Act, 2007 which preceded the enactment of the Constitution in 2010 which created specified limitations under article 24. These claimants will therefore be declined.
37. The claimant did not only base his claim under article 41 and the Employment Act only. There are other constitutional claims based on articles 27 and 54. This will be addressed separately. To analyse these claims I wish to go back to the reason that caused the termination of the claimant. He was retired on medical grounds. On September 27, 2010 the Respondent wrote to the claimant and stated;

Re: Retirement of Grounds of ill Health

Medical records maintained in your personal file held here show that your current health condition has not been stable due to the injuries you sustained on April 17, 2002. This resulted to the decision by the Commissioner of Police to request the Director of Medical Services to convene a Medical board with a view of ascertaining your ability to effectively discharge your duties as a Police Officer.

According to the Medical board proceedings, you were found to be unfit for further service incapable by reason of your health condition to effectively discharge your duties as a police officer. The board recommended that you be retired from the Police service on grounds of ill health.

In view of the medical board’s findings and in accordance with the force standing orders chapter 20 paragraph 30C and code of regulations section R25, the Commissioner of Police is now contemplating to retire you from police service on grounds of ill health. However, before taking such an action, you are called upon to make your own representations over the matter is any. Your response is expected not later than one month from the date of this letter.

Where your response is not received within the given period, the Commissioner of Police will proceed to retire you without further consultations.

38. The claimant made his presentations on October 12, 2010 in response to the above letter by the COP dated September 27, 2010. His main contention was that he was reviewed by the Medical board in 2006 when he was still unwell and thus would require a new assessment as to his current status with regard to the injury he had earlier suffered in 2002.
39. On December 16, 2010 the COP wrote back noting;



You were given a show cause letter as to why you should not be removed from the force on ground of ill health in view of the medical Board findings and upon perusal of representation, it was decided that you be removed from the service with effect from January 17, 2011.

40. This process to retire the claimant on medical ground had its basis from the Medical board assessment of the climate in their report dated 2 July 1, 2006. He was retired on January 17, 2011, after 5 years from the date of the medical report. In the medical board report, present were Dr MP Simiyu, Dr Recho kamau and Dr Immaculate Kathure who observed the Claimant as;

He is an adult male in good nutritional status, well oriented in time, place and person. All systems reviewed were found essentially normal except ... we found that he has residual permanent paralysis of both lower limbs, loss of urine and stool control and loss of sensation from the waistline downwards.

41. The conclusion was;

... he is confined on wheel chair for life. We recommend retirement on medical grounds.

42. That review was done in 2006. The claimant left the Police Service on January 17, 2011. Pending this retirement, there were fundamental changes taking place around the claimant, the respondent and the Kenyan society. From 2002 to 2010 when the claimant was injured and then retired respectively, there were 8 years which had brought wide ranging changes to the world and indeed to Kenya and the Kenyan people. Within this time, there were ranging developments with regard to employers and employee rights as well as the rights of persons with disabilities. These changes include the passing by Kenya of the *Persons with Disabilities Act, 2003*; the coming into force of the UN Convention on the Rights of Persons with Disabilities in 2008, which Kenya ratified in 2008; the coming into force of a new Constitution in 2010 and with these changes, the passing of a new labour regime in 2007 which saw several pieces of legislation especially the *Employment Act, 2007*. These are changes that cannot be ignored with regard to the claimant's claim. The timing of it and the circumstances under which he was retired on medical grounds and the date of his retirement. These must be looked at in whole and cannot be separated as concerns the Force Standing Orders, which Force Standing Orders must be seen and addressed in the context of the new labour regime, the *Constitution* and the rights of a person living with a disability.

43. I agree with the respondent's submissions that the claimant was retired on medical grounds and not due to his disability. However every person whether with a medical condition or with a disability a persons with a disability has constitutional protections as a vulnerable person due to ill health or a medical condition. There should be no discrimination against any person whether directly or indirectly due to one's status based on any condition or on the basis of the disability. This is prohibited under article 27 of the *Constitution*. Such persons should enjoy equal protection and equal benefit of the law. Part of these enjoyments is the fundamental rights and freedoms to be treated equally and fairly in all spheres of life. In the claimant's case, the review of the medical Board was clear to the extent that he had lost control of his lower limbs but the rest remained essentially normal. It is the claimant's case that despite the fact that the COP was fully aware of the fact that the claimant's disability was limited to his lower limbs only, and his house was fitted with ramps to the kitchen and bedroom, there were no efforts to provide him with reasonable accommodation or to employ him in the categories of work that he was capable of performing, as a state organ, the COP and by extension, Police Service Has a constructional duty to take measure so as to reasonably accommodate an officer with a disability as in the case of the claimant. The assessment of the Medical Board, clearly noted that the claimant had only lost control of his lower limbs and the rest was in essentially normal meaning, the claimant was fundamentally and or in reality in good and normal condition. He had not lost his skills and can still engage in other duties



subject to reasonable accommodation. I find the Police Service possesses the economic power, facilities and logistics for accommodating the claimant's condition and that by assigning the claimant alternative duties, the Police Service would not have suffered any undue hardship or prejudice. To support this proposition counsel relied on the case of *Cuiellette v City Council of Los Angeles* (Cal Rptr 3d, CalApp Dist, April 22, 2011).

44. The claimant submitted that he was discriminated against contrary to articles 27(4), 41(1) and 54 of the Constitution. He also pleaded that section 15 of the *Persons with Disabilities Act* was violated. The *Constitution* now has explicit provisions which provide a foundation for the rights of persons with disabilities. The preamble and the provisions on national values and principles contained in article 19 lays emphasis on dignity, human rights and social justice for all persons. In giving effect to the provisions of the *Constitution* and the Bill of Rights, the place of persons living on the margins of society must be articulated as required by articles 19(2), 20 and 21. Article 28 protects the right of any person to be treated with dignity.

45. The *Constitution* also provides a window for enforcement and enrichment of the rights and freedoms of persons with disabilities through the application of international law principles, treaties and conventions Kenya has ratified. This is through the provisions of article 2(5) and (6). Article 1 of the *Convention on the Rights of Persons with Disabilities* states;

“Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

46. Article 27 of the *Constitution* forbids discrimination on any of the grounds including disability. It provides;

“The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

47. Apart from article 27, article 54 makes specific provisions for the application of the rights of persons with disability and it provides as follows;

5. 54 (1) A person with any disability is entitled -

6 (a) To be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

7(b) To access educational institutions and facilities for persons with disabilities that is integrated into society to the extent compatible with the interests of the person;

8(c) To reasonable access to all access to all places, public transport and information;

9(d) To use sign language, Braille or other means of communication;

10(e) To access materials and devices to overcome constraints arising from the person's disability.

11(2) The State shall ensure progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.”



48. My reading of both sections 2 of the Employment Act (No 11 of 2007) and Persons with Disabilities Act (No 14 of 2003) the definition of 'disability' is the same and has been outlined to mean;

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

49. Therefore, the application of the UN Convention on the Rights of Persons with Disabilities must be seen in the context of the Constitution as well as other statutory and policy regulations with regard to non-discrimination provisions. Discrimination is outlawed whether directly or indirectly and cannot be justified whether on the ground of disability or health status or any other status. Thus under the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 (Legal Notice No 62 of 2009) there are provisions for Public Service Employment. Rule 12 of these rules forbids any public service establishment from dispensing with, or reducing in rank an employee merely on account of disability. The rules also provide for transferal of an employee to some other suitable post who after acquiring disability is not suitable for the post he was holding. These efforts are not left at the discretion of an employer. There are constitutional and statutory safeguards to protect persons with disabilities and other vulnerable persons against discrimination on the basis of their disability, health status, or other grounds. In this case, the COP's action of retiring the claimant prior to the retirement age shifts the burden of proof on the Respondent to prove that the action is justified in terms of the law and Constitution.

50. The claimant gave evidence that since his release from hospital in November 2003 he was serving at the Police Clinic until his retirement by the Police Service on medical grounds. He was able to access his house while in service with the installation of ramps. He was paid his salaries for time served. He has since taken up a taxi business where he drives a conditioned vehicle due to his disability and has been earning his living from this business. Therefore, prior to retirement, the Police Service had taken some measures in an effort to accommodate the claimant. However, the respondent submitted that these measures were undertaken by the claimant's former colleagues at work to facilitate his family to access facilities in his house. This was a most absurd statement by the respondent as the ramps in the claimant's house were not required by his relatives rather, these were assistive devices required by the claimant for access. The house occupied by the claimant was the property of the respondent Police Service and any changes must have been approved by the COP or another person in authority. The claimant also gave evidence that he served at the Police Clinic in the records department to which the respondent submitted that the claimant had no skills so as to be deployed at such a specialized office. Contrary to these submissions, the claimant as an officer who is essentially normal had more to offer to the Respondent Police Service and to keep records at the Police Clinic with appropriate access devices does not require specialized skill. In any event where such skill is required the Respondent Police Service has the resources to facilitate the claimant of that skill. In any event the claimant undertook these tasks for over a period of 5 years. He could only receive training to perfect the skill he had already acquired through practice taking and keeping records at the Police Clinic. The Police Service had the means to provide reasonable accommodation for the claimant a duty vested on the employer by the Persons with Disabilities Act which provision must be exercised without discrimination as per the Constitution.

51. I agree with the holding in Petition No 93 of 2012, Paul Anupa et al v the Attorney General et al held that employment is not just a source of livelihood but something that defines our self-worth or dignity. The court made reference In Foley v Interactive Data Corp (1988) Cal Rptr 211 it was held that;

“A man or a woman usually does not enter into employment solely for the money; a job is status, reputation, a way of defining one's self worth and worth in a community. It is also



essential to financial security, offering assurance of future income needed to repay present debts and meet future obligations. Without a secure job, a worker frequently cannot obtain a retirement pension, and often lacks access to affordable medical insurance. In short, “in a modern economy employment is central to one’s existence and dignity.”

52. This sentiment is consistent with the right to dignity guaranteed by article 28. The claimant had specifically trained for a job in the police service and suffered disability at a prime age while on duty, to deny him the opportunity to carry on police duties when he was able to do so amounts to a violation of dignity. In the South Africa Labour Appeals Court, *Public Servants Association of South Africa v Ministry of Safety and Security & South African Police Service* [2009] JA91/09 in a case where the appellant, a senior superintendent in the police service suffered major depression and was terminated on the grounds of ill health and temporary incapacity, the court held that there was no fair reason to retire the officer on grounds of ill health this was grossly unreasonable, arbitrary and unjustifiable. The decision should have been reviewed on the following grounds;

“The action was procedurally unfair in taking the decision irrelevant considerations were taken into account or relevant considerations were ignored;

The action/decision was taken arbitrarily or capriciously;

The decision was grossly unreasonable; and or The decision is unconstitutional in that it constitutes an unfair labour practice.”

53. This holding also finds firm foundation in our Constitution as at article 47 on fair administrative action which binds the government and or its various agencies particularly the respondent Police Service in this case where the claimant was employed. Article 47 is outlined;

47(1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) Promote efficient administration.”

54. Can the decision of the Medical Board and its use by the respondent be said to have met the threshold outlined under article 47” The validity and legality of the decision made by the respondent against the claimant must be assessed within ambit of his constitutional rights. In this case, the COP referred the claimant’s case to the medical board which made a recommendation. The Force Standing orders require the COP to consider these recommendations and based on the circumstances of the affected officer and upon consideration of all factors affecting his constitutional rights, there was a duty on the COP to go beyond the Medical Board recommendations. Save for the reliance on the medical report recommendations as the basis of its decision, the COP did not tender any evidence before this court to show that the claimant was unfit or incapable of discharging alternative duties within the Police Service. Furthermore, the COP has also not put forth any material to discount the claimant’s contention and prove that it lacked the means or facilities to accommodate the claimant or that he was not capable of any further service in the Police Service as to warrant the discharge making the COP decision lack



in basis, justification, reason and hence no validity. This decision remained subjective as no inquiry of the claimant's status at the time of retirement was made, the COP simply relied on the Medical board report and no consideration was made when the claimant lodged his appeal. In light of the responsibility cast on the COP or the person exercising this power under regulation 30 of chapter 20 of the Force Standing Orders by the provisions of the Constitution and the Person with Disabilities Act, the COP should have considered reasonable accommodation of a person with disabilities. Further authority for this course is to be found in section 7(1) of the sixth schedule to the Constitution which requires that all law existing prior to the effective date of the Constitution must construed with the necessary "alterations, adaptations, qualifications and exceptions to bring it into conformity with this Constitution."

Where the Force Standing Orders are inconsistent with constitutional provisions, those Force Standing Orders must undergo alternations, adaptations, and exceptions so as to be in conformity with the Constitution.

55. My reading of the Force Standing Orders, especially regulation 30 of chapter 20 offends the provisions of article 47(2) of the Constitution. Where a person is adversely affected by an administrative action, the person has a right to be given written reason for the action. This would require a hearing and evaluation of each case in circumstances that would entail meeting the tenets of the rules of natural justice. Basically it requires that before making a decision affecting another person's rights or interests, that other person should be given a hearing. In the instant case, the respondent did not plead that it gave the claimant the opportunity to make any representations nor is there evidence that it extended to the claimant the opportunity to make representations. There is no evidence of how the claimant's appeal was handled if at all. In any case, communication about the claimant was shared to third parties and therefore there is no other conclusion i can reach except that the retirement of the claimant on the ground of ill health of the claimant was unfair. The rules of natural justice were not observed.i therefore find and hold that the claimant's rights were violated in this regard.
56. I find that the claimant's rights guaranteed under articles 27, 28 and of the Constitution were violated by the COP by retiring the petitioner medical grounds under regulation 30(c) of chapter 20 of the Forces Standing Order without taking into account the possibility of reasonable accommodation. As a consequence of this failure to reasonably accommodate the claimant, the COP violated section 15(6) of the Persons with Disabilities Act by retiring the claimant before the prescribed retirement age.

Remedies

57. The claimant's case has been determined under the Constitution which finds force and effect in the Persons with Disabilities Act and the UN Convention on the Rights of Persons with Disabilities. Both the statute and the Constitution protects and promotes as the rights of the persons with disabilities and give effect to the rights of persons with disabilities, even in a case of an employer and employee relationship and under the powers granted to this court as a superior court of record and under section 12 of the Industrial Court Act and the court can grant such relief as is appropriate to ensure that the rights infringed are vindicated. As assessed above, the claimant's rights as under the Employment Act are already ousted; the only remedies available are those that arise from the outlined constitutional and statutory infringement. The claimant is therefore entitled to an award of general damages for breach of his rights. Taking all factors into account, doing the best I can in the circumstances, I award Kshs 3,000,000.00 would be an appropriate award for general damages.



Conclusion

58. In view of the foregoing, I enter judgement for the claimant against the respondent in the following terms:
- a. The claimant is awarded Kshs 3,000,000.00 as compensation by the respondent.
 - b. Costs of the suit shall be borne by the respondent.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2014

M. MBARU

