



**DOW v Attorney General (Cause 89 of 2013)
[2014] KEELRC 753 (KLR) (25 April 2014) (Judgment)**

Duncan Otieno Waga v Attorney General [2014] eKLR

Neutral citation: [2014] KEELRC 753 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 89 OF 2013

ON MAKAU, J

APRIL 25, 2014

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER THE CONVENTION OF PERSONS LIVING WITH DISABILITIES**

**IN THE MATTER OF THE UNIVERSAL DECLARATION ON HUMAN RIGHTS,
ICCPR, ICESCR, THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS.**

IN THE MATTER OF SECTION 12 OF THE INDUSTRIAL COURT ACT

BETWEEN

DOW CLAIMANT

AND

THE HON ATTORNEY GENERAL RESPONDENT

Dismissal on medical grounds where an employer's medical board had recommended rehabilitation for specialized duties is discriminatory.

The claimant contested the decision of the National Police Service to dismiss him from employment on medical grounds. The claimant was blind and when he faced the medical board, it was recommended that he be rehabilitated to perform specialised duties. Despite the recommendation, the claimant was dismissed on medical grounds. The court held that the dismissal was discriminatory and was done in breach of the Persons with Disabilities Act.

Reported by John Ribia

Constitutional Law -fundamental rights and freedoms - discrimination - protection from discrimination and equality before the law - termination of employment due to blindness - whether a claimant could file a claim for discrimination on medical grounds under the considering the did not regard disability as an element of discrimination - whether the retirement of a police officer on medical grounds where the medical board of the police service recommended that the police officer be rehabilitated to perform special duties amounted to discrimination and contravention of the provisions of the Persons with Disabilities Act. - , article 29; , section 74; article 1;



Labour Law - employment Law - unlawful termination of employment - termination of employment due to blindness - discrimination as envisaged under section 15 and 22 of the Persons with Disabilities Act - whether termination of employment on medical grounds could be unlawful on the basis of the provisions of section 15 and 22 of the Persons with Disabilities Act - , article 29; , section 74; article 1; .

Brief facts

The claimant was enlisted as a Police Constable into the Kenya Police Force on March 22, 1986 after successful training at the Kenya Police College. He however developed an eye problem but continued to do special duties allocated by his seniors. These duties included manning the Report Office and the Radio Room. In 2004, the Police Commissioner transferred the claimant to the Central Police Station despite protest by the claimant.

For the period between 2004 to 2008, the claimant was not assigned any duties although he was fully able to do certain special duties as he used to do at the Central Bank of Kenya Police Post. In 2008, the claimant appeared before the Medical Board at Nairobi whereby the Board recommended that he be rehabilitated to perform special duties such as Radio Operator, Telephonist and Receptionist.

Contrary to the Board's recommendation, the Commissioner of Police commenced proceedings for the removal of the claimant vide a notice to show cause why he should not be removed on medical grounds under section 30(2) of the s. The claimant responded to the show cause letter but was nevertheless removed and his appeal to the Commissioner of Police was dismissed.

Issues

- i. Whether the termination of the employment of a police officer on medical grounds where the medical board of the police service recommended that the police officer be rehabilitated to perform special duties amounted to discrimination and contravention of the provisions of the Persons with Disabilities Act.
- ii. Whether a claimant could file a claim for discrimination on medical grounds under the repealed Constitution considering the repealed Constitution did not regard disability as an element of discrimination.

Held

1. It was doubtful whether it was impossible to train and rehabilitate the claimant. The employer saw the condition of the claimant advance until he got to total blindness. A reasonable employer should have assisted the claimant to gain the necessary skills even from the various public institutions for the blind. Instead the respondent recklessly waited for the opportune moment to dismiss the claimant at the hour of need without any assistance.
2. The fact that the Police Service was not employment as known to strict law, put the respondent at a higher obligation to protect and go an extra mile in ensuring that the welfare of those who suffered disability during their service and even after service was held supreme. The were brought to question on that basis. At that time and era, there could not be some legislation which continued to run contrary to the Constitution and the international law which had then become part of municipal law once ratified.
3. The retirement of the claimant on medical grounds was discriminative and a contravention of his fundamental rights and freedoms as enshrined under the and the international human rights instruments. As much as the repealed Constitution did not regard disability as an element of discrimination, provided the desired protection to fill up the lacunae that existed in the repealed Constitution.
4. A declaration that the right to be treated with dignity as provided for under article 1 of the had been violated by the respondent could not be made since the cause of action in that dispute was older than the . Article 29 and 2(6) of the could not apply retrospectively. The court could not order recalculation of the pension based on the minimum retirement age of 60 years.
5. The respondent made no offer on damages, he just contended that the pension awarded was adequate because the law was followed. However the law was not complied with, that did not mean that there was



immunity from losing office on grounds of disability. The law demanded that such loss of job should be the last resort if alternative duties could be assigned to the affected employee and the employee was able to do them with or without training and rehabilitation. It was common knowledge that there were certain disabilities both physical and mental that allowed for the removal of any one from office depending on the nature of the work.

6. The respondent terminated the claimant's employment prematurely and in violation of section 22 of the and discriminated against the claimant and continued to violate section 15 of the .

Judgment entered for the claimant in the sum of Kshs 3 million awarded as compensation for premature termination of services and discrimination on ground of disability. Damages were mitigated by the fact that the claimant was awarded pension which he continued to receive at the expense of the tax payers.

Citations

East Africa

1. *Sang, Anthony Kipkorir v Attorney General* Cause No 2408 of 2012 - (Followed)

United Kingdom

1. *Cuerden v Yorkshire Housing Limited* UKEAT No 0397 of 2009 - (Explained)

United States

2. *Cuiellette v City of Los Angeles*, No B224303 (Cal Ct App Apr 22, 2011 - (Explained)

Statutes

East Africa

3. Constitution of Kenya, 2010 articles 10, 27, 47, 54; sixth schedule section 7 -(Interpreted)
4. Constitution of Kenya, 1963 (Repealed) section 74-(Interpreted)
5. Employment Act, 2007 (Act No 11 of 2007) section 3-(Interpreted) 4. Persons with Disabilities Act, 2003 (Act No 14 of 2003) sections 11, 12(1); 15(1),(2)(b),(6); 22; 29 -(Interpreted)

International Instruments & Covenants

1. Universal Declaration of Human Rights (UDHR), 1948 article 1

JUDGMENT

Introduction

1. This is a case about violation of fundamental rights and freedom not protected under the Bill of Rights as enshrined in the [Constitution of Kenya](#). The rights and freedom allegedly contravened are provided for under the [Persons with Disabilities Act](#) and several international instruments.

Background

2. On April 24, 2013, the claimant filed this claim seeking:
 - a. Declaration that his employment was terminated by the respondent prematurely and in violation of section 22 of the [Persons with Disabilities Act](#).
 - b. Declaration that the respondent has discriminated against the claimant and or violated and continues to violate section 15 of the [Persons with Disabilities Act](#).
 - c. Declaration that the unfair labour practices and the unfair administrative action by the respondent amounts to treating the claimant in an inhuman and degrading manner which violates article 29 of the [Constitution](#) (section 74 of the repealed [Constitution](#)).



- d. Declaration that the right to be treated with dignity as provided for under article 1 of the [Universal Declaration of Human Rights](#) (UDHR) has been violated by the Respondent.
 - e. An order for calculation and award of the claimant's lost years on the basis of a retirement age of 60 years as provided for in section 15(6) of the [Persons with Disabilities Act](#).
 - f. Compensation
 - g. Any other order and/or directions that this court may deem fit to grant.
3. Before the claim was filed, the claimant unsuccessfully filed a constitutional petition before the High Court seeking almost similar reliefs. The court made several findings before striking out the petition and which findings were never challenged by review or appeal and as such they remain in force. The court will address that later in this judgement.
 4. In response to the claim, the respondent denied the alleged violation of the claimant's rights and freedoms. The respondent further averred that the fundamental rights and freedoms were not absolute and that the [Employment Act](#) did not apply to nullify the Kenya Police Force.

Facts of the Case

5. The claimant was enlisted as a Police Constable No 50981 into the Kenya Police Force on March 22, 1986 after successful training at the Kenya Police College. At the time all his faculties and senses were normal and in order. He was posted to various stations during his 22 years service of which he was never subjected to any disciplinary proceeding within the force for any offence.
6. While serving at the Central Bank of Kenya (CBK) Police Post in Mombasa between 1993 and 2004, he developed eye problem but he continued to do special duties after acquiring good mobility skills at the Central Bank of Kenya Police Post. The special duties allocated by his seniors included manning the Report Office and the Radio Room at the said Central Bank of Kenya Police Post. In addition the Bank provided him with a convenient residence within her staff quarters.
7. In 2004, the Police Commissioner transferred the claimant to the Central Police Station despite protest by the claimant. For the period 2004-2008 the Claimant was not assigned any duties although he was fully able to do certain special duties as he used to do at the Central Bank of Kenya Police Post.
8. In 2008, the claimant was referred to appear before Medical Board at Nairobi whereby the Board recommended that he should be rehabilitated to perform special duties such as Radio Operator, Telephonist and Receptionist.
9. Contrary to the Board's recommendation, the Commissioner of Police commenced proceedings for the removal of the claimant vide a notice to show cause why he should not be removed on medical grounds under section 30(2) of the Force Standing Order. The Claimant responded to the show cause letter but was nevertheless removed and his appeal to the Commissioner of Police dismissed. The basis for the removal against the advise of the Medical Board was that the police force did not offer training for radio room operators, receptionists or telephonists.
10. On August 27, 2009 the claimant was awarded pension gratuity of Kshs 604,860.00 plus a monthly pension of Kshs 7,561 effective December 19, 2008. The claimant was therefore effectively prematurely retired at 46 years instead of 60 years.
11. According to the defence the cause of the claimant's disability was not directly or indirectly related to his work or working environment. In addition to the foregoing the Medical Board held on July 26, 2008 concluded that the claimant was not able to discharge routine police duties.



12. The defence further contends that the police did not offer training and rehabilitation to visually disabled officers hence the early retirement was given on medical grounds because the police force required a medically fit person. The defence concludes by maintaining that the procedure followed in retiring the claimant was fair and within the law including the force standing orders.
13. The claim was disposed of by written submissions which were briefly highlighted on February 11, 2014 by Mr Chigiti learned counsel for the claimant and Mr Ngare the learned state counsel appearing for the Respondent.

Claimant Submissions

14. It was submitted that the claimant was discriminated on the basis of disability when he was retired on medical grounds without according him reasonable accommodation. The said retirement contravened the convention on the Rights of Persons with Disabilities and section 11 and 12(1) of The Persons with Disabilities Act. The retirement was also in contravention of section 15(6) of the said Act which provides for the minimum retirement age for persons with a disability as 60 years. According to the claimant, he was not accorded equality before the law and thereby his dignity was taken away.
15. It was further submitted that there are other duties in the police force other than routine functions including telephone operation, reception and manning radio room. Such other duties were the ones recommended by the Medical Board and of which the claimant was doing upto 2004 while stationed at the Central Bank Police Post. In his view, the claimant contends that instead of retirement he should have been accorded reasonable accommodation by being absorbed in the none routine/special duties like Front Desk and or Occurrence Desk, Radio Room, Telephonist, Receptionist or Quarter Master Stores.
16. The effect of the said discrimination according to the claimant is that it has taken away his dignity and jeopardised the rights of his young family which had relied on him as the sole bread winner. The claimant prayed for compensation for discrimination. He also prayed for recalculation of his pension gratuity and monthly pension based on the statutory retirement age of 60 years. He contended that retiring at age of 46 years he was deprived of 14 years of productive service.
17. In his brief highlight, Mr Chigiti Advocate clarified that the claim is not based on the Employment Act in view of section 3 of the said Act. He also clarified that the claim was founded on the repealed constitution, The Persons with Disabilities Act and international law which were all in force before the 2010 Constitution.
18. The counsel further submitted that this court has jurisdiction to determine all matters including Human Rights Violations. He urged the court to award monetary compensation if it finds that there was violation and suggested a figure of kshs 10 million. He cited a number of both local and international authorities.
19. In conclusion Mr Chigiti Advocate urged that the court finds that the Force Standing Orders have outlined their purpose and they should be reassessed to bring them to speed with article 10, 27 and 54 of the new constitution as read with section 7 of the Sixth Schedule of the said Constitution.

Respondent's Submissions

20. The respondent has submitted that the removal of the claimant was procedural, lawful and within the scope allowed by the law as contained in the Force Standing Orders and Public Service Regulations. According to the Respondent, the Medical Board found the claimant unable to discharge routine police duties and recommended that with training and rehabilitation the claimant could perform other



functions. However the respondent does not offer such training and as such retirement had to be done. In so retiring the claimant there was no violation of the Constitution which as was found by the High Court in Petition 94 of 2011 Duncan Otieno Waga v The Attorney General.

21. The respondent has further submitted that the retirement of the claimant on medical grounds did not violate section 15 and 22 of the Persons with Disabilities Act as there was no discrimination. According to the Respondent, the Retirement of the claimant fell within section 15(2)(b) of the said Act and could not amount to discrimination because of the nature of the work done by police.
22. As regards section 22 of the Act, the Respondent submitted that the proprietors of public buildings had 5 years to modify the buildings to suit persons with disabilities and as such the claimant did not prove any violation of such provisions.
23. On the issue of unfair administrative action, the Respondent submitted that, the right is protected under article 47 of the 2010 Constitution and its violation was not proved.
24. On the violation of dignity, the Respondent denied such violation by submitting that no evidence of stigmatization was adduced by the claimant.
25. On the compensation, the respondent submitted that the claimant was awarded Kshs 604,860 in addition to Kshs 7,561 monthly pension. He is therefore not entitled to any further compensation because the retirement on medical ground was in a procedurally sound manner and with full compliance with the law, rules and regulations in force at the time.
26. In his brief highlight Mr Ngare Advocate submitted that this court cannot sit on appeal over findings made by the High Court of which no review or appeal was preferred. He further submitted that unless the Force Standing Orders were amended they remain the law and should be followed in this claim.

Analysis and Determination

27. The issues for determination arising from the pleadings and submissions range from violation of fundamental rights and freedoms to compensations. The summary of the issues is as follows:
 - a. Whether the retirement of the claimant on medical ground was tantamount to discrimination and contravention of his rights and freedoms under the statute and international law
 - b. Whether the reliefs sought out to issue

Violation of Rights and Freedoms

28. The High Court in Petition 94 of 2011 supra, found that the retirement of Claimant on medical grounds did not contravene the Constitution because disability was not an element of discrimination under the repealed Constitution.
29. The claimant however contended that the rights and freedoms under review were protected under the Persons with Disabilities Act and the convention on the rights of persons with disabilities. Section 15(1) of the Act bars employers from discriminating against a person with disabilities in any matter related to employment. Regulation 11(1) bars public service establishments from dispensing with or reducing in rank an employee merely on account of disability. Section 15(6) provides for the minimum retirement age for persons with disabilities at 60 years.
30. In view of the foregoing the claimant contends that he was discriminated against when he was retired on medical grounds. He believes that there are other officers with disabilities who were not retired with



him. Lastly he submits that he was not accorded “reasonable accommodation” as provided for under the law.

31. Article 1 of the *Convention on the Rights of the Persons Living With Disabilities* defines reasonable accommodation as the necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.
32. The claimant believes that he was granted accommodation for 9 years upto 2004 when he was assigned special duties such as manning the Report Office and Radio Room at the Central Bank of Kenya Police Post, Mombasa. He was however denied the opportunity to continue serving when he was transferred to an unfamiliar police station and denied training and rehabilitation as recommended by the Medical Board.
33. According to the claimant, apart from the routine patrol and firearm handling, there are none routine or special duties of the police including Front desk and/or Occurrence Desk, Radio Room, Telephonist, Receptionist and Quartermaster Stores where the Respondent could have absorbed him as a measure of reasonable accommodation.
34. The respondent has not denied that there are such special duties as alluded to by the claimant. The respondent has also not denied that for close to 9 years the claimant was able to do such special duties without any training. In addition, this court doubts whether it was impossible to train and rehabilitate the claimant. The employer saw condition of the claimant advance until he got to total blindness. A reasonable employer should have assisted the claimant to gain the necessary skills even from the various public institutions for the blind. Instead the respondent recklessly waited for the opportune moment to damp the claimant at the hour of need without any assistance. The respondent never testified on the cost of training or rehabilitating the claimant in a public institution or at all.
35. This court is of the considered view that, the fact that police service is not employment as known to strict law, puts the respondent to a higher obligation to protect and go an extra mile in ensuring that the welfare of those who suffer disability during their service and even after service is held supreme. Consequently, the Force Standing Orders are brought to question on the foregoing basis. At this time and era there can never be some legislations which continue to run contrary to the *Constitution* and the international law which has now become part of our municipal law once ratified.
36. By now it must be obvious that this court is making a finding that the retirement of the claimant on medical grounds was discriminative and a contravention of his fundamental rights and freedoms as enshrined under the *Persons with Disabilities Act* and the international instruments aforesated. As much as the repealed constitution did not regard disability as an element of discrimination, the foregoing statute provided the desired protection to fill up the lacunae that existed in the repealed constitution.

Reliefs Sought

37. The court is persuaded on a balance of probability in view of the above finding to make declarations in terms of prayer (a) and (b) of the claim.
38. The court will not however make declaration in terms of prayer (c) and (d) in view of the decision by Majanja J in Petition No 94 of 2011 supra, that the cause of action in this dispute was older than the 2010 *Constitution* and as such article 29 and 2(6) of the said constitution cannot apply



retrospectively to this case. The court will also not order recalculation of the pension based on the minimum retirement age of 60 years.

39. The court will however award damages for discrimination and violation of the claimant's fundamental rights and freedoms. The claimant has asked for Kshs 10 million. He cited Sue Johnstone the editor of *Equal Opportunities Review (EOR)* [www.eordirect.co.uk] who argues that the discrimination on grounds of disabilities continues to attract high awards averaging at 7,904.
40. The claimant also cited *Cuerden v Yorkshire Housing Limited* [www.eordirect.co.uk] a case on disability where the claimant was unlikely to get future employment was awarded 59,264 for loss of pension. He also cited *Cuittette v City of Los Angeles* [www.apbusinesscontacts.com] where an award of \$1.5 million was made for discrimination.
41. In the present case, the claimant submits that he has no hope of future employment due to his total blindness. He was however awarded a pension gratuity of Kshs 604,860 upon retirement plus a monthly pension of Kshs 7,561 which he continues to enjoy.
42. The respondent made no offer on damages. He just contended that the pension awarded was adequate because the law was followed. The court has however made a finding that the law was not complied with. This is not to say that there is immunity from losing office on grounds of disability. What the court is saying is that the law demands that such loss of job should be the last resort if alternative duties can be assigned to the affected employee and be able to do them with or without training and rehabilitation. It is common knowledge that there are certain disabilities both physical and mental that allows the removal of any one from office depending on the nature of the work.
43. The court being satisfied on a balance of probability that such reasonable accommodation was denied for no good cause in this case, it will be right in awarding damages.
44. In this case however, the damages are mitigated by the fact that the claimant was awarded pension which he continues to receive at the expense of the tax payers. The court therefore awards him Kshs 3 million as compensation for discrimination. In making the said award, the court has been persuaded by the decision of Mbaru J in ICC 2408 of 2012 *Anthony Kipkorir Sang v The Hon Attorney General* cited by the claimant, where the court awarded Kshs 3 million for termination of employment and discrimination on grounds of disability. The said decision is not binding on this court, but there is no reason why a different award should issue.

Disposition

45. In view of the reasons and finding made above judgement is entered for the claimant against the respondent as follows:
 - a. Declaration that the respondent terminated the claimant's employment prematurely and in violation of section 22 of the *Persons with Disabilities Act*.
 - b. Declaration that the respondent has discriminated against the claimant and or violated and continues to violate section 15 of the *Persons with Disabilities Act*.
 - c. Award of Kshs 3 million being compensation for premature termination of services and discrimination on ground of disability.
 - d. Costs and interest from date of filing this suit.

It is so ordered

SIGNED, DATED AND DELIVERED THIS 25TH DAY OF APRIL, 2014.



ONESMUS MAKAU
JUDGE

