



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 27 OF 2012**

**MARY WANGUI GAKUNJU .....CLAIMANT**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI .....RESPONDENT**

Mr. Gathego for Petitioner.

Mr. Kuria T.M. for the Respondent.

**JUDGMENT**

The Petitioner *Mary Wangui Gakunju* filed **Petition No. 319 of 2011** at the High Court alleging contravention of fundamental rights and freedoms under **Article 19 (3) (b), 21 (3), 22(1), 23, 27(4) and (5), 54 and 165 (3)(b)** of the Constitution of Kenya 2012 and **Section 15(6) of Persons with Disability Act Cap 14 of 2003**.

The facts giving rise to the petition and specifically pleaded in the petition may be summarized as follows:

That the Petitioner is a person with disability and is registered as such with the **National Council for persons with Disabilities**.

That the Petitioner was an employee of the Respondent, **City Council of Nairobi** and had served as an employee thereof for 29 years as an assistant in Clinics Grade 14 at Makadara Health Centre. The letter of appointment dated 21<sup>st</sup> April, 1986 is attached to the petition.

That by a letter dated 2<sup>nd</sup> June, 2008, the Respondent issued a six months notice to the Petitioner to retire in compliance with **Public Service Commission (Local Authority Officers) Regulations 2007**.

The Petitioner had attained the age of 55 years upon which retirement was due in terms of the above cited regulations.

The Petitioner wrote to the Respondent requesting that she be allowed to retire at the age of 60 years in terms of **Section 15 (6) of the Persons with Disability Act Cap 14 of 2003** which provides the minimum retirement age for persons with disability as 60 years.

The Petitioner's request was not heeded and she was retired at the age of 55 years. Efforts to get

reinstatement were unsuccessful hence this suit.

The Respondent was served with the petition but did not file any response.

The Petition was also served on the Attorney General who has filed written submissions as a friend of the court.

As at the time of retirement in December, 2008 the Petitioner earned a basic salary of Kshs.18,900/= and House Allowance of Kshs.7,500/=. Her gross monthly earnings were Kshs.26,400/=. The matter was transferred to the Industrial Court on 3<sup>rd</sup> October, 2012.

The facts averred in the petition remain uncontroverted and the court finds that the same are true reflection of the status of the Petitioner.

The issue for determination is whether the Petitioner was entitled to retire at the age of 60 and if so what remedy she is entitled to.

### **The law**

**Section 15 (6)** of the persons with Disabilities Act Cap 14 of 2003 provides

**“The minimum retirement age for persons with disability shall be sixty years.”**

This Act was operative on 2<sup>nd</sup> December, 2008, when the Petitioner was retired from service upon serving six (6) months notice from 2<sup>nd</sup> June, 2008.

**Section 15 (6)** is couched in mandatory terms and the Respondent was bound by its provisions.

The Honourable Attorney General in his written submissions while acknowledging this provision submits that the Public Service Commission had a policy then where its employees retired at the age of fifty five (55) years unless they volunteer to retire early.

That the Petitioner was therefore retired according to the policy in place at the time in terms of Public Service Commission (Local Authority Officers) Regulations 2007.

That this retirement age was applicable to all public officers and the provisions of **Section 15 (6)** of the Persons with Disabilities Act, Cap 14 of 2003, if implemented with respect to the retirement age, would have amounted to discrimination. The court notes that the retirement age for all public officers has since been changed to 60 years.

That the Respondent avoided this absurd result by retiring the Petitioner at the age of 55 years like all other public officers at the time.

It is the court's considered view, however the Regulations cited herein above providing for retirement at the age of 55 years could not override express provisions of a statute, being **Section 15 (6)** of the persons with Disability Act, 2003.

Furthermore, positive discrimination by way of affirmative action with respect to persons acknowledged by law to be disadvantaged due to their disability is a practice recognized world over.

The court finds that the Respondent was bound by the express provisions of **Section 15 (6)** of the Persons with Disabilities Act, 2003 to retire the petitioner at the age of sixty (60) years.

That it was unlawful to retire the petitioner at the age of fifty five (55) years in the circumstances of this case.

## **Remedy**

The Petitioner has prayed for:

0. *declaration that she is entitled to retire at the age of sixty (60) years and therefore entitled to income till attainment of that age of sixty (60) years or*
0. *an order compelling the respondent to compensate and pay to the Petitioner all salary from 1<sup>st</sup> January, 2009 to 31<sup>st</sup> December, 2013 when she is lawfully supposed to retire from employment or*
0. *an order to issue to compel the Respondent to reinstate and recall back the Petitioner to complete her employment period which period should run until her attainment of sixty (60) years and the Respondent be compelled to compensate and or pay her salary since 1<sup>st</sup> January, 2009 until reinstatement.*

**Section 12 (3)** of the **Industrial Court Act 2011** empowers the court to make:

*(iv) a declaratory order;*

*(v) an award of compensation in any circumstance contemplated under this Act or any written law*

*(vi) an order for reinstatement of any employee within three years of dismissal, subject to such conditions the court thinks fit to impose under circumstances contemplated under any written law; or*

*(vii) any other appropriate relief as the court may deem fit to grant.*

It is now about five (5) years since the Petitioner was retired unlawfully. She was denied by the Respondent her remuneration including salary, allowances and statutory contributions towards her medical treatment and pension by fact of the unlawful retirement to her loss and detriment.

It is not appropriate to order reinstatement of the Petitioner taking all the circumstances of this case into account.

Accordingly, the Respondent is directed to pay to the Petitioner all lost remuneration including salaries and allowances for the period 1<sup>st</sup> January, 2009 to 31<sup>st</sup> December, 2013 in the sum of Kshs.907,200 (26,400 x 12 x 4) less taxation to the Kenya Revenue Authority.

The Respondent is also to pay the costs of this suit.

It is so ordered.

***Dated and delivered at Nairobi this 6<sup>th</sup> day of September, 2013.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**