



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 567 of 2012

SILAS RUKUNGU KARANJA.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. This is the judgment in the case of Silas Rukungu Karanja against the Teachers Service Commission of Kenya. The claimant appeared in person while the Commission, the respondent, was represented by Moraa Ondieki Advocate.
2. The claimant filed the memorandum of claim on 4.04.2012. He submitted that he was employed as a teacher by the respondent in May 1975. He was diligent, dedicated, industrious and loyal throughout his service. In the course of his service, he was struck with blindness and as a person with blindness he became entitled to the rights of persons with disabilities as provided for in the Persons with Disabilities Act, 2003 being Act No. 14 of 2003.
3. In particular, he pleaded that he was entitled to the protection of the provisions of section 15 (6) of the Act which entitled him to retire at the age of sixty years and not the age of fifty five years which generally, at all material time, applied to public officers who are not persons with disabilities. The section provides, ***“15 (6) The minimum retirement age for persons with a disability shall be sixty years.”***
4. The claimant further pleaded and submitted that the respondent in total and flagrant disregard of the section of the Act decided to retire him upon attaining the age of fifty five years and not sixty years as provided for in the Act. Accordingly, the claimant filed a claim for judgment against the respondent for:
  - a. the payment of Ksh. 433,200.00 being salary for sixteen months during which as a person with disability he was entitled to be in employment of the respondent but the respondent had decided to retire him prematurely at the age of fifty five years;
  - b. costs of the suit;
  - c. interest on the principal claim and the costs; and

d. any other relief as the court may deem just.

5. The respondent filed the statement of defence on 25.05.2012 and pleaded as follows;

a. The claimant was employed by the respondent on permanent and pensionable terms on 1.05.1975 and allocated TSC No. 61938 and posted to Mbari ya Ruga Primary School in Thika District as per the letter of probationary appointment being annex 1 on the statement of defence.

b. The claimant's employment was governed by the provisions of the Education Act, Cap 211, the Teachers Service Commission Act, Cap 212 and the Code of Regulations for Teachers, and the Pensions Act, Cap 189 of the Laws of Kenya, as well as, administrative circulars issued by the respondent from time to time.

c. The claimant was posted to various public primary schools within Kenya and paid monthly salaries in accordance with his contract of employment.

d. The claimant in the course of his employment requested for a transfer from Rwathe Primary School in Kandara to Thika School for the Blind which the respondent approved immediately authorizing the transfer. The claimant's application for the transfer dated 20.09.1995 was received by the respondent on 27.09.1995 and stated as follows,

*"The Secretary,*

*Teachers Service Commission*

*Private Bag,  
NAIROBI  
Thro'*

*The District Education Officer*

*P.O. Box 118  
MURANG'A  
Dear Sir,*

**RE: TRANSFER TO A BLINDS SCHOOL**

*Since mid last year I developed a problem of losing sight which has affected my duties as a headmaster so seriously. I have been undergoing eye treatments since then but my doctors have now confirmed that the oncoming blindness cannot be reversed.*

*On approaching Thika Blind School they have advised me to join them as a teacher in order that they will teach me how to handle Braille as I continue teaching in their school.*

*I am in view of the above calling you Sir, to transfer me to that school to save my situation.*

*Yours faithfully,*

*Signed,*

**SILAS R. K. NJOROGE**

**TSC/61938"**

e. The claimant served in the respondent's employment until 31.08.2005 when he was due for retirement at the age of fifty five years in accordance with the provisions of the Pensions Act, Cap 189 Laws of

Kenya whereupon the respondent accordingly issued the claimant with a notification of compulsory retirement on age grounds vide a letter dated 30.08.2004. The notice of compulsory retirement being annex 3 on the statement of defence informed the claimant, among other things, that:

- i. records held by the respondent indicated that the claimant was born in August, 1950;
  - ii. the claimant will have attained 55 years of age for compulsory retirement on 1.09.2005;
  - iii. the claimant by 1.09.2005 would have attained the pensions qualifying age and his last day of service will be 31.08.2005;
  - iv. the claimant should prepare to submit the relevant documents to hasten processing of his pension benefits.
- f. Before the notification letter of 30.08.2004, the respondent had written a letter dated 3.06.2004 seeking to retire at the age of sixty years in accordance with the provisions of the Persons with Disabilities Act, 2003. The claimant's letter of 3.06.2004 received by the respondent on 15.06.2004 stated as follows,

***“RUKUNGU S.K. REUBEN***

***THIKA SCHOOL FOR THE BLIND***

***P.O. BOX 80***

***THIKA***

***3<sup>RD</sup> JUNE 2004***

***PERMANENT SECRETARY***

***MINISTRY OF EDUCATION***

***P.O. BOX 30040***

***NAIROBI***

***Dear Sir,***

***RE: APPLICATION FOR RETIREMENT AT SIXTY YEARS AGE LIMIT***

***I am visually impaired (Blind) teacher based at the above mentioned school. I am fifty four years of age.***

***I am married and blessed with five children, aged between 8yrs-18yrs. Three of them are in Primary School. Two of them in High School.***

***I hereby kindly apply to be allowed to retire at the age of 60 years, as allowed by disability act 2003 paragraph 15.***

***Thanking you in advance.***

***Yours faithfully,***

***SIGNED,***

***S.K. Reuben***

***T.S.C No. 61938***

***c.c. The Secretary***

## ***Teachers Service Commission***

### ***Private Bag Nairobi***

g. That owing to the delay by the Directorate of Personnel Management (DPM) in providing the implementation guidelines of the Persons with Disabilities Act, the respondent decided to engage the claimant on contract terms for a duration of 2 years with effect from 1<sup>st</sup> January 2007 to 31<sup>st</sup> December 2008 with a view to comply with the provisions of the said Act; whereupon the claimant sought extension of his employment contract of service vide the National Council for Persons with Disabilities and in person. The Ministry of Education, Science and Technology's letter to the DPM is dated 8.03.2005 being annex 5a on the statement of defence requested the DPM to consider the claimant's application to retire at the age of 60 years. The DPM reply is dated 26.04.2005 and received on 3.05.2005 being annex 5b on the statement of defence and by which the respondent was requested to forward the claimant's files to the DPM. By the letter dated 9.05.2005 being annex 5c on the statement of defence and received by the respondent on 11.05.2005, the Ministry of Education, Science and Technology asked the respondent to forward the claimant's files to DPM. By the letter dated 6.10.2005 being annex 5d on the statement of defence, the respondent wrote to the DPM conveying that the claimant retired with effect from 01.09.2005 on old age grounds, that he was previously teaching at Thika School for the Blind, that he is blind, that he had requested to be retained in service till he attained the age of 60 years as provided in the Persons with Disabilities Act, and that the DPM should guide on the matter. By the letter dated 3.11.2005 being annex 5e on the statement of defence, the DPM wrote to the respondent referring it to the letter No. PSC. 2/1/2 (15) dated 12.10.2005 from the Secretary, Public Service Commission of Kenya and advising that the respondent may wish to refer the case to the Public Service Commission of Kenya. In the letter by the Public Service Commission of Kenya, the Commission had stated that for officers falling under its jurisdiction, requests for implementation of the Act should be forwarded to the Commission for appropriate decisions in the usual manner and on individual basis.

h. The respondent engaged the claimant on contract terms by an agreement dated 1.01.2007 being annex 7a on the statement of defence. Under the contract, the first term was 1/1/2007 to 31/12/2007 being one year and the second term was 1/1/2008 to 31/12/2008 being another one year.

i. By the letter dated 3.05.2006 being annex 7b on the statement of defence, the National Council for Persons With Disabilities requested the respondent to facilitate the claimant's service until the attainment of 60 years of age because the claimant who had been retired in August 2005 was a person with disability entitled to retire at age 60 as per section 15 (6) of the Persons with Disabilities Act, 2003. By a letter dated 12.06.2008 being annex 7c on the statement of defence, the claimant had written to the respondent as follows,

***“Dear Sir,***

***RE: EXTENSION OF THE SERVICE***

***I the undersigned is a visually impaired teacher by profession, currently teaching in the above mentioned. (Meaning Thika Primary School for the Blind).***

***Sir, I want to extend my service up to the age of 60 years as provided for by the Disability Act part III section 15 clause 6 which states that “Persons with disability shall retire at minimum age of 60 years”.***

***Thank for allowing me to serve at contract terms since 1<sup>st</sup> January 2007 ti 31<sup>st</sup> December 2008.***

***Enclosed here find a copy of the National Council for persons with disabilities.***

***Thanking you in advance, I remain***

***Yours Faithfully,***

**TSC61938”**

- j. By the letter dated 21.07.2008 being annex 8, the respondent informed the claimant that he would be retained in employment until 1.09.2010 and that if he wished to retire earlier, he would be required to advise the respondent in writing. The letter also informed the claimant that all other terms and conditions of service under which he was then serving would continue to apply.
- k. That the respondent paid the claimant salary and allowances for the four years he served on contract and paid him service gratuity of Ksh. 242,563.00 as provided for in the contracts and as per the payment voucher being annex 9.
- l. That the claimant is not entitled to the payment of Ksh. 433,200.00 for the 16 months period from September 2005, to December 2006 when the claimant was not engaged in the employment of the respondent.
- m. That the claimant was not dismissed from the service but was retired on compulsory retirement at the age of 55 years in accordance with the Pensions Act, Cap 189 of the Laws of Kenya and his pension benefits duly processed.
- n. That under the provisions of section 18 (1) and (2) of the Employment Act, 2007 the claimant was not entitled to salary during the 16 months period from September 2005 to December 2006 because he did not work and salary is compensation for both physical and mental effort exerted in the cause of one's employment.
- o. The respondent also pleaded that the relationship between the employer and the employee is based on the doctrine of mutual obligation and understanding and the respondent was within its statutory mandate to apply the law as it is and should not be punished for doing so. Thus, the respondent stated that the claimant's claims were unjustifiable and devoid of any merit.
6. The case came up for hearing on 18.10.2012. The claimant testified in support of his case. He also called one other witness, his son and aide. The respondent called one witness.
7. The claimant testified as follows:
- a. That his name is Silas Rukungu Karanja and he was born sometimes on an unknown date in 1950 at a place called Kandara in Murang'a County.
- b. That he is a well trained P1 teacher who was employed by the respondent in May 1975.
- c. That he taught diligently and faithfully helping the Kenyan child and he was deployed to serve in various public primary schools such as Mbari ya Ruga in Thika District, Kirigitho, Kithigia and Rwathi.
- d. That due to his loyal and dedicated service, the respondent promoted him to various higher grades. He was promoted to deputy head teacher of Rwathi Primary School and in 1995 while serving in that school he was promoted to head teacher. The school had been the poorest academically in the District ranking but due to his effort, leading the school community, the school was uplifted and it was around that time and due to his efforts beyond the call of duty, the claimant testified, that his sight started to disappear. He testified that he used to wake up very early and at 6.00a.m he would be in the school. The capillaries ruptured in his eyes. According to his doctor, one Dr. Wood, his eyes were completely gone and the doctor recommended to him to opt for early retirement on account of ill health. He pleaded with the doctor that his wife was a house wife and he had young children including a son who was then two years old. That was in 1995. He had just been promoted to a head teacher at Rwathi Primary School. The doctor recommended that he joins the Thika School for the Blind.

8. The claimant applied and the respondent deployed him to Thika School for the Blind on 14.12.1995. He quickly learnt Braille for six consecutive months and became conversant with it. He was allowed to continue teaching at the school.
9. In September 2004, the respondent served the claimant a retirement notice stating that he would proceed to retirement with effect from 30.08.2005 because he would then have attained the age of 55 years. Fortunately, in 2003, Parliament had passed the Persons with Disabilities Act which entitled persons with disabilities like the claimant to retire at a minimum age of 60 years as per section 15 (6) of the Act. Armed with the Act, the claimant wrote to the respondent a letter dated 26.06.2004 asking that he be allowed to retire at the age of 60 years. By then the respondent's human resource officer at the headquarters in Nairobi was one Mr. Kariuki. He suggested that the claimant be given a contract of about two years but then he retired from TSC on 31.12.2005. He handed over the claimant's file to one Mrs. Maundu and the claimant visited her office and quoted the Act to her. She promised the claimant that she would present the case to the respondent but later informed the claimant that the respondent had rejected the provisions of the Act.
10. The claimant then went to the Permanent Secretary at the Ministry of Education in Jogoo House, Nairobi. That was in August 2005 and he had not retired because he had not attained the age of 55 years. The officers at the Ministry learnt that the claimant was teaching in a special school and so they referred him to one Mr. Musa Wambua who was an officer responsible for the department of special education. The claimant stated that the said Wambua had the Persons with Disabilities Act, 2003 on his table. He had been given the Act by the Permanent Secretary to determine how the persons with disabilities would be helped to benefit from the Act. He told the claimant that the Permanent Secretary had told him to inform the claimant to wait and come back at a future date. The claimant protested and objected.
11. Following the protestation, the claimant was referred to the Ministry's legal officer one Mr. Kachivi who told the claimant to bring all his documents relating to the case. Subsequently, the claimant brought to him the documents and the legal officer referred the claimant to another officer who then referred the claimant to the DPM.
12. At the DPM the claimant met an officer one Mrs. Gachango and her secretary one madam Nancy. Mrs. Gachango telephoned the respondent and told the receiver of the call who was Mrs. Maundu to allow the claimant to continue in service until relevant policies to implement the law were set.
13. The claimant went to Mrs. Maundu and she refused to implement the directive as given by Mrs. Gachango of the DPM. The claimant made many rounds of trips between the Ministry of Education, the respondent and the DPM. He went to see the Assistant Minister for Education at Jogoo House in Nairobi. On the appointed date, he met officers from the department of Special Education one Mr. Yator and Mr. Wambua. Mr. Yator was the boss to Mr. Wambua. The officers were questioned by the Assistant Minister who stated that he had been part of the politicians who had initiated the Act while in opposition and now that it was law, it was his directive to the officers to implement it.
14. The claimant was later referred to the National Council for Persons with Disabilities who registered him as a person with disabilities by issuing him a registration card number NCPWD/35637 dated 21.03.2012 serial number 0000952 with the nature of disability being blind. At an earlier date, before the registration, the Council had given a letter to the claimant to take to Mrs. Maundu and on seeing the letter, Mrs. Maundu stated, ***"Even if you go to who or who, the Commission's decision is final."*** This had been after a struggle of 16 months. The claimant did not remember the date but it was around July 2006. The letter from the Council was dated 3.05.2006 and is attached on the claimant's memorandum of claim. The claimant asked Mrs. Maundu why she could not honour the directive and position of the Minister for Education.
15. The claimant went back to the respondent's offices in August 2006 and met Mrs. Maundu's deputy called Mrs. Mungai. He asked Mrs. Mungai whether the letter from the Public Service Commission had reached the respondent because DPM had asked them to seek advice from the Commission so that the

claimant would be treated like officers of the Commission. Mrs. Mungai asked him his name and his file was on her desk and she confirmed that she had received the letter from the Commission. It was in September, 2006 that the claimant received a letter from the respondent informing him that he could resume duty with effect from 1.01.2007. The claimant was happy because those were pleasant news. But then, he had been discriminated, mistreated and lost 16 months from 1.09.2005 to 31.12.2006.

16. The claimant prayed for remedies because he had suffered a great deal. He had no money to feed his children and to educate them. At the time of the hearing of the case, the claimant still suffered from the injury occasioned by the respondent's refusal to implement the provisions of the Act as the claimant was entitled to retire upon attaining the age of 60 years. His daughter who would be in Form 4 this year (2012) dropped out from a provincial school called Githunguri Girls High School and she was in 2012 in Form 3 at Kimuchu Secondary School where she is a day scholar. The claimant could not pay the fees for the provincial school and she had delayed her education arising from the actions of the respondent to disobey a clear provision of the Act. The claimant's other son was in 2012 at Kirwara Boys High School and the claimant feared that he may have to transfer him to a day school due to lack of finance unless the respondent was ordered to purge the injury occasioned to the claimant.

17. The claimant complained that his contract with the respondent had ended on 1.09.2010 and he had been out of employment since then. He knew that the government had, as at 24.11.2010, extended the retirement age of all public officers to retire upon attaining the age of 60 years. That as far as persons with disabilities were concerned, the Government had undermined their rights by failing to enhance their retirement age to 65 years at the time the retirement age for all civil servants was increased to 60 years generally. The claimant testified that persons with disabilities had been advocating for the increase of their retirement age to 65 years and that had been a subject of a Parliamentary motion by which it was resolved that persons with disabilities should retire, at minimum, upon attaining the age of 65 years since the age of retirement for persons without disabilities had been enhanced to 60 years. Thus, the Government had belatedly issued a circular to the public service dated 29<sup>th</sup> May, 2012 enhancing the minimum mandatory retirement age for persons with disabilities to 65 years of age. The circular whose copy the claimant produced marked exhibit C1 and addressed to Chief Executive Officers in the public service including the respondent's secretary stated as follows,

***“RETIREMENT AGE FOR PUBLIC SERVANTS WITH DISABILITIES***

***Your attention is invited to this Ministry Circular Ref: MSPS HRM/2/2/2/(76) of 24<sup>th</sup> November, 2010 in which it was clarified that Public Servants with disabilities would retire at the age of 60 years as applicable to other Public Servants.***

***Following petitions by Public Servants in this category, the Government has considered the request to raise their retirement age to 65 years.***

***It has therefore been decided to accord this category of employees a longer working period with guaranteed earnings as way of cushioning them against uncertainties usually associated with retirement from formal employment.***

***Accordingly, the mandatory retirement age for Public Servants with disabilities has been raised to 65 years with effect from 1<sup>st</sup> July, 2012. This applies to employees with disabilities as defined in section 2 of the Persons with Disabilities Act, 2003 who are also registered with the National Council of Persons with Disabilities.***

***Please bring the contents of this Circular to the attention of all the staff concerned.***

***Signed***

***Titus M. Ndambuki, CBS***

***PERMANENT SECRETARY***

***CC: Permanent Secretary, Secretary to the Cabinet and Ag. Head of the Public Service,***

***Harambee House,  
NAIROBI***

18. The claimant therefore stated that persons with disabilities had been discriminated against because the Government had belatedly agreed to implement the retirement age of 65 years. As an individual, the claimant stated that he had particularly suffered and he was entitled to enjoy the belated acceptance of the policy on 65 years retirement age for persons with disabilities because he was energetic and ready to work in view of that policy.

19. The claimant's second witness was his son Benjamin Njoroge Karanja. He testified that the sum of Ksh. 433,200.00 was arrived by multiplying the claimant's last basic pay of Ksh. 27,075.00 with the sixteen months he did not work due to the claimant's refusal to implement the relevant Act. The basic pay was as per the pay slip for April, 2010 which the witness produced as exhibit C2. He testified that the respondent had admitted the breach of the Act and the unfair discrimination by readmitting the claimant back to work on contract. That it was common knowledge that other teachers with disability after the claimant served until they attained the age of 60 years.

20. The respondent's witness was one Lawrence Kigen TSC No. 600699, the respondent's Assistant Director of Human Resources with seventeen years experience. He stated as follows;

- a. That in 2005 the policy was that teachers would retire at the age of 55 years.
- b. The respondent was guided with the DPM on matters of policy on human resource matters.
- c. That in the claimant's case the respondent consulted as per the letters attached on the memorandum of defence.
- d. The claimant was subsequently engaged on contracts by the respondent which ended upon his attainment of 60 years of age. The respondent paid the claimant the salaries, allowances and gratuity as per the contract.
- e. The claimant requested for continued service up to age 60 years but that was not granted because the respondent did not have policy on the issue.
- f. The claimant was not entitled to pay for the sixteen months he did not work because the respondent pays only for the services rendered.
- g. The Commission had discretion to allow or not allow the respondent to serve up to attainment of the age of 60 years.
- h. That he had seen the Act on disability but not read it to detail. He could not remember the details. The DPM had advised the respondent to apply its discretion in the claimant's case. The respondent was aware of the Act but delayed in issuing the relevant policy to implement it. The witness did not know the reasons why the respondent at its meetings had decided to delay the issuance of the policy to implement the Act.
- i. The witness did not know the effective date of the Persons with Disabilities Act, 2003. The Act raised policy issues which the witness had no authority to deal with.

21. The court has considered the pleadings and evidence on record and makes the following findings:

- a. At all material times the claimant was a person with blindness and therefore entitled to the rights of persons with disabilities as provided for under the Constitution and under the statutory provisions.
- b. The Persons with Disabilities Act, 2003 came into operation in 2003. Section 15(6) of the Act provides that the minimum retirement age for persons with disabilities shall be sixty years. The court considers that

whenever a person with disability is to retire on account of a retirement age, the minimum such retirement age must be sixty years. The provision applies to all employers and such employees in public service, private sector and all other categories of employment. It is not disputed that the claimant attained the age of 55 years on 1.09.2005 long after the Act had come into operation. The court finds that the claimant was entitled to benefit from the provisions of the Act.

c. It has been submitted for the respondent that the reason the claimant was not allowed to benefit from the provisions of the Act is that the respondent did not have the relevant policy to implement the provision in the Act on retirement at a minimum age of 60 years for persons with disabilities. The court has carefully considered the submission and finds that the respondent flagrantly breached the clear provisions of the Act without any good reason. It is not disputed that the claimant was a person with blindness and the respondent was aware of that fact way back on 14.12.1995 when it transferred the claimant to serve at the Thika School for the Blind on account of the claimant's blindness. In view of the clear provisions of section 15 (6) of the Act, it is obvious that the issue of the nature and fact of the claimant's disability having been settled, the constitutional and statutory obligation of the respondent was to implement the express provisions of the law. It cannot be that Parliament considers policies and enacts them into law and individual persons, public officers, state officers and state organs choose not to implement the law in search of unjustified or fictitious operational policies to achieve such implementation of the law. In the instant case, long before the claimant attained the age of 55, the respondent was aware of the claimant's case and ought to have taken steps for smooth implementation of the Act. The relevant steps were not taken on time as expected. It is notable that even when the DPM required the respondent to forward the claimant's files, there is no evidence that the respondent complied with that request. Further, when the respondent was advised by the DPM to forward the claimant's case to the Public Service Commission of Kenya, there is no evidence that the respondent complied. At the hearing, the witness for the respondent testified that the respondent failed to retain the claimant in the service up to attainment of 60 years of age because of consultations on the implementation policy. The witness, in a contradictory manner, also testified that the respondent had discretion in the matter. The court finds that the submission that the respondent was seeking DPM's policy advice was not only misconceived because the statutory provision was clear, but it was also pretentious because when the advice was provided, the respondent did not follow it due to unexplained reasons.

d. The claimant's case is that he is entitled to be paid for the 16 months that he did not work after attaining the age of 55 years when the respondent refused to allow him to continue in service because of the flagrant and deliberate refusal to comply with the Act. The respondent has opposed the claimant's claim by stating that since the claimant did not work, he was not entitled as prayed. To support the submission, the respondent has invoked the provisions of section 18 (1) of the Employment Act, 2007 which provides that an employee is entitled to be paid proportionately to the work done. The court finds that it was not the fault of the claimant that he did not work but it was due to the respondent's unfair termination of the contract of employment. The termination of the contract of employment was invalid because the claimant was entitled to retire upon attaining the age of 60 years and the termination was therefore unfair under section 43 of the Employment Act, 2007. The court further finds that the claimant is entitled to 12 months gross salary at the rate of the gross monthly salary at termination. Accordingly, the court awards the claimant a sum of **Ksh. 492,738** at the rate of Ksh. 41,061.50 as per the claimant's payslip for July 2005 attached on the memorandum of claim.

22. The claimant has prayed for any other relief as the court may deem just. The court has considered this prayer and finds that it has jurisdiction under section 12 (3) (viii) of the Industrial Court Act, 2011 which empowers the court to make any other appropriate relief as the court may deem fit to grant. Under the prayer, the court makes the following findings:

a. The claimant has established that the respondent deliberately refused to implement the statutory provision which entitled the claimant to retire at the age of 60 years. The respondent is a Commission which was established by statute at the time it flagrantly refused to obey and implement the clear statutory provision. The court has found that the respondent did not have or advance any reasonable or lawful ground for the failure to comply with the provision of the law. The respondent in failing to implement the law subjected the claimant to a lot of pain and suffering including tossing him from its offices and around

other public offices in circumstances whereby the claimant was entitled to enjoy the provisions of the law by the respondent making a decision for him to continue in service until the attainment of the age of 60 years. The claimant has demonstrated that he continues to suffer pecuniary embarrassment arising out of the actions and inactions of the respondent. The respondent is currently established in Article 237 of the Constitution. As a constitutional Commission, the respondent's objectives include to protect the sovereignty of the people; to secure the observance by all state organs of democratic values and principles; and to promote constitutionalism. The respondent is also required to adhere to and promote the Public Service values and principles as provided for in Article 232 of the Constitution and some of which include high standards of professional ethics as well as responsive, prompt, effective, impartial and equitable provision of services. It is notable that under Article 249 (2), (a) the respondent in the discharge of its functions is subject to the law. In addition, the respondent is bound to observe the national values and principles in Article 10 of the Constitution and which include human dignity, equity, social justice, inclusiveness, equality, human rights and non-discrimination. In the opinion of the court, the unashamed failure by the respondent to implement section 15 (6) of the Persons with Disabilities Act, 2007 in favour of the claimant was a serious misconduct that undermined the obligations vested upon the respondent in view of the enumerated provisions of the Constitution. The court finds that the respondent was at all material times and always required to strictly adhere to and implement the relevant statutory provision failing which, it was and is strictly held liable. For breach of its strict obligation to implement the statutory provision in favour of the claimant, the court finds the respondent strictly liable to pay the claimant a sum of **Ksh. 1,000,000.00**.

**b.** It is the claimant's case that the respondent discriminated against him. The court has considered this claim against the evidence on record. The issue for determination is whether the respondent, on the material on record did discriminate the claimant on account of disability. Under section 2 of the Persons with Disabilities Act, 2003, "discriminate" means to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures or caricatures that demean, scandalise or embarrass a person with a disability. The claimant testified as at paragraph 14 of this judgment thus, ***"The claimant was later referred to the National Council for Persons with Disabilities who registered him as a person with disabilities by issuing him a registration card number NCPWD/35637 dated 21.03.2012 serial number 0000952 with the nature of disability being blind. At an earlier date, before the registration, the Council had given a letter to the claimant to take to Mrs. Maundu and on seeing the letter, Mrs. Maundu stated, "Even if you go to who or who, the Commission's decision is final." This had been after a struggle of 16 months. The claimant did not remember the date but it was around July 2006. The letter from the Council was dated 3.05.2006 and is attached on the claimant's memorandum of claim. The claimant asked Mrs. Maundu why she could not honour the directive and position of the Minister for Education."*** The claimant's evidence was not disputed by the respondent and the court trusts it as credible. The court finds that such attitude and behaviour on the part of the officer of the respondent was discriminatory as it was derogatory and calculated to harass and embarrass the claimant being a person with blindness and who was genuinely pursuing his rights. The court has also observed and noted the evidence that at all material times, the Public Service Commission of Kenya had implemented the statutory provision for retirement at the age of 60 years for public officers with disability and on case to case basis. The claimant's case obviously qualified for such treatment but for the respondent's discriminatory treatment including the respondent's failure to act on the claimant's case. The court further notes that the respondent in a discriminatory manner failed to allow the claimant to continue in employment up to the age of 60 years on permanent and pensionable terms as it was contemplated in the statute. Instead, the respondent imposed discriminatory periodic contracts of one year, another one year and then after the claimant's beseeching and pestering, another last one of two years. The periodic contracts obviously imposed unique terms of service on the claimant and which invariably did not apply to the permanent and pensionable teachers employed by the respondent. The relevant copy of the contract is annex 7a on the statement of defence. For example, clause 9.0 on termination, the respondent could at any time determine the claimant's engagement by giving him a three months' notice or by paying him one month's salary in lieu of notice. Also, clause 1.0 provided that the claimant, notwithstanding the completion of his term of engagement, would be detained in the service at the option of the respondent for a further period not exceeding six months if, in the opinion of the respondent, the exigencies of the teaching service demanded it. In the opinion of the court, such provisions of the contract were inconsistent with the claimant's entitlement to

permanent and pensionable terms until the attainment of the statutory retirement age of 60 years and further, the court finds that the respondent imposed such discriminatory contractual terms on the claimant solely due to the blindness. Article 27 of the Constitution protects the claimant from direct or indirect discrimination on the ground of disability. Article 54 of the Constitution specifically provides that a person with any disability is entitled to be treated with dignity and respect and, the respondent is required to progressively implement the principle that at least five per cent of the teachers in its service are persons with disabilities as provided for in Sub-Article 54 (2) of the Constitution. Under section 5 (3) of the Employment Act, 2007, the respondent is precluded from discriminating the claimant on the ground of disability as it happened in the instant case. Under section 5 (6) of the Act, it was the burden of the respondent to prove that the discrimination did not take place and which burden the respondent failed to discharge. Under section 5 (1), the court is vested with the duty to promote equality of opportunity in employment in order to eliminate discrimination in employment. In addition, the respondent is mandatorily required to promote equal opportunity in employment and strive to eliminate discrimination in all its employment policy or practice. It is the court's considered opinion that an employee suffers injury whenever the employer discriminates on the ground of disability and in such instances the employee is entitled to compensation. In the instant case, the respondent, in discriminating the claimant behaved in a high handed malicious, insulting and oppressive manner and flagrantly breached express statutory provisions that the claimant was entitled to. The respondent did not, at all material times, bother to apologise to the claimant and the court takes the opinion that the respondent approved the high handed and maliciously insulting attitude and behaviour of its officers against the claimant. As demonstrated by the testimony of the respondent's witness, the respondent in total disregard of its important constitutional and statutory role and status chose to adopt an indifferent and callous approach to the very serious entitlement of the claimant as a person with disability. Accordingly, the court finds that in this case, the respondent discriminated the claimant on the ground of disability and is therefore liable to pay the claimant a sum of **Ksh.1, 000,000.00**.

c. The claimant is willing to continue in employment until the attainment of the age of 65 years. The court has considered the claimant's submission and finds that the circular dated 29.05.2012 became effective on 1.07.2012 long after he had left the service of the respondent on 1.09.2010. Accordingly, the court finds that on the effective date of the circular, the claimant was not in the public service. The respondent has not opposed the claimant's request to continue in employment. The claimant is a highly experienced teacher who last served at the Thika School for the blind which is a special school. The court is alert to the constitutional duty of the respondent to progressively work towards employing at least five percent of teachers with disabilities. The court finds that the circular prescribing the retirement of persons with disabilities to retire at the age of 65 years was calculated to give effect to that constitutional provision. The court has also taken into account the claimant's submission that the circular on the 65 years retirement age came long after the one increasing the retirement age of public officers without disabilities to 60 years so that had the circular on the 65 years age been timely, the claimant would be a direct beneficiary. The court considers that the delayed or belated release of the circular on the 65 years retirement age for persons with disabilities should not be relied upon to deny the claimant the constitutionally guaranteed real and effective protection. The court In the instant case, the court finds that the respondent will not suffer any practical difficulty in reengaging the claimant back to serve at the Thika School for the Blind. Accordingly, the respondent shall reengage the claimant to continue serving as a teacher at the Thika School for the Blind with effect from 15<sup>th</sup> November, 2012 at the claimant's last grade with applicable terms of service and subsequently the due terminal benefits and until at least 1<sup>st</sup> September, 2015 when the claimant will attain the age of 65 years, unless lawfully terminated earlier.

23. In conclusion, judgement is entered for the claimant against the respondent for:

- a. a declaration that the decision by the respondent to retire the claimant from the public teaching service upon the claimant's attainment of the age of 55 years amounted to unfair termination of the claimant's contract of employment;
- b. the respondent to pay the claimant a sum of **Ksh. 2, 492,738.00** plus interest at court rates from the date of the judgment till full payment; and

c. the respondent to pay the costs of the case.

**Delivered in court at Nairobi on 2<sup>nd</sup> November, 2012**

**Byram Ongaya**  
**JUDGE**