



**DUNCAN OTIENO WAGA .....PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL ..... RESPONDENT**

## **JUDGMENT**

### **Introduction**

1. At the material to this claim the petitioner was a police officer. His services were terminated when he became visually impaired. He brings this claim to vindicate his fundamental rights and freedoms. The basis of his claim is that he suffered discrimination as a person with physical disability.

### **Facts**

2. The facts concerning the petitioner's career in the police force up to the time of his dismissal are not in dispute. They are set out in the petition and petitioner's supporting affidavit sworn on 3<sup>rd</sup> June 2011. The facts are confirmed by replying affidavit sworn on 18<sup>th</sup> November 2011 by Mr George Omwoyo, an Assistant Commissioner of Police.

3. The petitioner was enlisted as a police constable into the Kenya Police Force on 22<sup>nd</sup> March 1986 after successfully completing his training at the Kenya Police Training College, Kiganjo.

4. Following his enlistment, the petitioner was posted to various Police Stations. He was first posted to Mbaraki Police Depot Mombasa where he served till 1988. Thereafter, he transferred to Bamburi Police Station and in 1993 he was sent to the Central Bank of Kenya (CBK) Police Post in Mombasa where he worked until 2004.

5. In 1996 the petitioner developed an eye ailment known as *retinitis pigmentosa* which gradually led to a complete loss of all but very limited peripheral vision. The petitioner underwent various stages of treatment but his condition continued to deteriorate.

6. Despite his condition, the petitioner acquired good mobility skills which enabled him to continue rendering service to the Police Force at the CBK Police Post in Mombasa. For a period of almost nine years, the petitioner, despite his disability, was assigned duties such as manning the Report Office and Radio Room at the CBK Police Post Mombasa. The petitioner avers that the working environment at the CBK Police Post was conducive for his condition and the bank had provided him with a convenient residence within their staff quarters.

7. In 2004, the Commissioner of Police (“the Commissioner”) transferred the petitioner to Central Police Station, Mombasa. The petitioner avers that the Commissioner effected this transfer even though it was well within his knowledge that police officers stationed at Central Police Station, Mombasa reside at Mbaraki Police Depot which is situated far from the Central Police Station where there is no direct means of transport. Given the petitioner’s disability, it was going to be virtually impossible for the petitioner to carry out his duties at the Central Police Station.

8. By his letter dated 6<sup>th</sup> January 2005, the petitioner appealed to the Commissioner to reconsider the transfer to Central Police Station Mombasa and retain him at the CBK Police Post where it was possible for him to continue with his duties in the radio room despite his disability.

9. When the petitioner reported to Central Police Station, he was not assigned any duties but was told to be on standby by the Officer Commanding Station (OCS) who was waiting for the Commissioner to respond to the petitioner’s appeal.

10. The petitioner claims that between 2004 and 2008, he was not assigned any duties though he was fully capable, despite his disability, of performing certain duties such as those he had performed in the nine years that he had been stationed at the CBK Police Post.

11. In 2008, the petitioner was instructed to appear before a Medical Board (“the Board”) at the Ministry of Health, Nairobi to show cause why he should not be removed from the force on medical grounds. The Board considered the petitioner’s case and recommended, in a report dated 12<sup>th</sup> of August 2008, that the he should be rehabilitated to perform special duties such as radio room operator, telephonist or receptionist.

12. The Commissioner, despite the Board’s recommendation, instituted removal proceedings against the petitioner and by his letter dated 9<sup>th</sup> of September 2008 required the petitioner to show cause why he should not be removed from the force on medical grounds under **Section 30(c)** of the **Force Standing Orders**.

13. The petitioner, by his letter dated 18<sup>th</sup> September 2008, once again appealed to the Commissioner to reinstate him at the CBK Police Post where he had learnt good mobility skills and been able to perform duties for a long period in excess of nine years. The petitioner’s wrote a further letter dated 4<sup>th</sup> December 2008 requesting the Commissioner not to retire him on medical grounds.

14. The Commissioner, by the letter dated the 10<sup>th</sup> November 2008 terminated the petitioner’s employment on medical grounds on the basis that the police force ‘*does not offer training for radio room, reception or telephonist*’ and was therefore incapable of retaining the petitioner on the force as recommended by the Medical Board. The petitioner was retired on medical grounds at the age of 46.

15. On 27<sup>th</sup> August 2009, the petitioner was awarded a pension gratuity of Kshs.604,860.00 and a monthly pension of Kshs.7,561.00 with effect from 19<sup>th</sup> December 2008.

### **The Petitioner’s Case**

16. In the petition dated 3<sup>rd</sup> July 2011, the petitioner avers that his constitutional rights under the

Constitution and the **Persons with Disabilities Act (Act No 14 of 2003)** were violated.

17. The petitioner avers that the respondent discriminated against him in violation of **Article 27(4)** of the Constitution by according him different treatment on the basis of his disability by refusing or failing to continue to assign him light duties like receptionist, radio room operator, clerical duties and or telephone operator as he had been competently performing since 1996 while at the CBK Police Post as recommended by the Medical Board.

18. By retiring the petitioner on medical grounds instead of making reasonable accommodation for him as required by law, and by calculating his retirement benefits at 46 years rather than at 60 years as he was entitled to by law, the respondent clearly violated the petitioner's rights under the Constitution, the **Persons with Disabilities Act** and the **Convention on the Rights of Persons with Disabilities ("the Convention")**.

19. The petitioner avers that the respondent ignored the fact he had successfully performed other duties within the police force at the CBK Police Post even though he had a visual disability and normal police functions like handling firearms fell outside his abilities. He further avers that the Commissioner ignored the fact that police officers perform tasks such as those of performed by telephone operators or receptionists and that there are many lighter duties within the police force that a visually impaired officer could perform.

20. The petitioner avers that the respondent has the financial ability, facilities and the logistics to accommodate him and had done so for the nine years he worked in the police service and there was no justification for the decision to retire him on medical grounds other than prejudice and discrimination based on his visual disability. He further avers that the force or the public would not have suffered any undue hardship or prejudice by the petitioner remaining within the force and continuing to perform the duties that he had competently performed during the time he was stationed at the CBK Police Post.

21. As a result of these violations the petitioner seeks the following reliefs in the petition;

(a) *A declaration that the act of sending the petitioner on early retirement by the respondent on the basis of his disability amounted to an act of discrimination against the petitioner and that it offends Article 27(4) of the Constitution.*

(b) *A declaration that the respondent has violated and continues to violate Section 15 of the Persons with Disabilities Act.*

(c) *A declaration that the Respondent has violated and continues to violate section 5(3) (a) of The Employment Act.*

(d) *A declaration that the right fair labour practices and to reasonable working conditions under Article 41(1) and (2)(b) have been violated and remain violated by the Respondent.*

(e) *A declaration that the right to be treated with dignity as provided for under Article 54(1) has and remains violated by the respondent.*

(f) *An order for calculation and award of the petitioner's retirement benefits and pension on the basis of a retirement age of 60 years as provided for under Section 15(6) of the Persons with Disabilities Act.*

(g) *Compensation.*

(h) Any order that this is a matter of public interest.

(i) Any other order and or directions that this court may deem fit to grant.

22. Mr Chigiti, representing the petitioner relied on the written submissions dated 18<sup>th</sup> January 2012 and further submissions on jurisdiction dated 24<sup>th</sup> May 2012. Apart from setting out the grounds set out in the petition, he submitted that though the petitioner was terminated on medical grounds he was ready and willing to continue service but he was denied the opportunity. The reasons advanced by the respondent to terminate petitioner's service were excessive and disproportional.

23. Counsel submitted that the petitioner's claim is founded on **Article 27(4)** which prohibits discrimination on the basis of disability. Apart from the Constitution, the petitioner relied on **the Convention on the Rights of Persons with Disabilities** which is a convention that Kenya has ratified and is now part of Kenyan law by virtue of **Article 2(6)** of the Constitution. **Article 4** of the **Convention** sets out the state obligation to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.

24. Mr Chigiti also referred to the government's obligation under **section 12(1)** of the **Persons with Disabilities Act** which provides that no person shall deny a person with a disability access to opportunities for suitable employment. Counsel submitted that the Act provides a legal framework that entitles persons with disability legitimate expectation that they shall be treated with equality and without discrimination.

25. The petitioner contends that **Article 1** of **the Convention** has been contravened. The Article requires that there must be necessary and appropriate adjustments which do not impose an undue burden where needed in a particular case. Counsel submitted that the respondent should have taken steps to ensure that when the petitioner was transferred, he was given an opportunity to perform those duties he had performed for nine years without complaint by anyone. The respondent acted contrary to **the Convention** by failing to accommodate the petitioner's needs yet there were many duties in police force which would have been performed by the petitioner.

26. Mr Chigiti relied on the case of **Cuilette v City of Los Angeles (Cal. Rptr. 3d, Cal. App. Dist, April 22, 2011)**. The California Court of Appeal considered whether a police department could be held liable for discrimination under the California Fair Employment and Housing Act for terminating the employment of a police officer it had assigned to light duty after he returned to work following a determination that he was 100% disabled in a worker's compensation proceeding. The Court held that the police force was liable for a violation of the statute because it failed to show that the officer could not perform the essential functions of the light duty position in which the department had placed when he returned to work. Mr Chigiti submits that the principle reasonable accommodation is workable within the Kenya police force.

27. Counsel also contended that the State would not suffer any hardship for providing reasonable accommodation to the petitioner as a result of his disability. According to the petitioner, the State had not provided any evidence to demonstrate the costs of training or rehabilitating a visually challenged person or the petitioner. Furthermore, there was no independent assessment to demonstrate hardship on the respondent's part.

28. The petitioner claims that his case should be seen in light of other physically challenged or impaired members of the police force. Counsel drew the courts attention to the existence of another

member of the police force who is visually challenged yet he was accommodated. The existence of a visually challenged officer read against the reason of the petitioner's termination is nothing short of discrimination. By way of comparison, counsel stated that there are persons living with HIV in the police force, known and unknown yet they are still serving in the police force. Counsel stated that selectively picking out a person who is visually handicapped points to an inequality and discrimination.

29. Counsel submitted that the petitioner is entitled to compensation and a sum of Kshs.20 million would be adequate in the circumstances. Counsel also submitted that the court should order the respondent to recalculate the petitioner's monthly pension.

30. Mr Chigiti also contended that since this matter has a public interest dimension. The court should give directions to the respondent to align the **Police Standing Orders** with the Constitution and its values.

### **Respondent's Case**

31. Mr. Kakoi, representing the respondent relied on the written submissions dated 8<sup>th</sup> December 2011. He submitted that there was no violation of the petitioner's rights as his retirement was on medical grounds as by the **Police Standing Orders**.

32. Mr Kakoi further submitted that the **Standing Order No. 9(b) 4 and 5** sets out the qualification of a police officer and a person without visual capacity does not qualify to be a police officer. This is recognized by **section 15(2)** of the **Persons with Disabilities Act** which excludes discrimination where the disability is a relevant consideration for employment.

33. Counsel emphasized that in the petition, the constitutionality of the **Police Standing Orders** was not challenged and the court cannot consider them without a direct challenge.

34. The respondent's position was that lack of funds and lack of expertise cannot be construed as violation of the basic rights. The prayers sought in the petition seek to compel the police to provide facilities for training and expertise for training persons with disabilities and this matter is outside the purview of what the court can direct.

35. Counsel also submitted that there is a difference between differentiation and discrimination and the latter has not been demonstrated. Counsel contended that the enlistment to the Police Force forms a classification of persons to be accepted into employment. This classification according to the respondents should not be viewed as discriminatory or unconstitutional.

36. The respondent's view is that this is a private dispute between an employer and employee over terms of service. It does not raise any constitutional issue and it ought to have been filed before the Industrial Court where the issue of computation of pension and terms of service could be determined by that court.

### **Issues for Determination**

37. This matter concerns the enforcement of fundamental rights and freedoms under the Bill of Rights. The petitioner also seeks to enforce certain provisions of the **Persons with Disabilities Act**. The facts relied upon by the petitioner took place between 2004 and 2008. It is therefore necessary to determine the applicability of the Constitution in determining the claim as a preliminary issue.

### **Applicable Constitution**

38. The Constitution promulgated on 27<sup>th</sup> August 2010 brought with it a new legal structure which was effective from that date. **Article 263** provides that the Constitution shall take effect on the date of promulgation while **Article 264** provides that on the date of promulgation the former Constitution subject to the **Sixth Schedule** shall stand repealed.

39. The effect of **Articles 263** and **264** is that the Constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution (See **Joseph Ihugo Mwaura v Attorney General Nairobi Petition No. 498 of 2009 (Unreported)** and **Du Plessis and Others v De Klerk and Another (CCT 8/95) [1996] ZACC 10**). The Constitution is only prospective and the acts occurring prior to the Constitution are, unless otherwise stated by the Constitution itself, to be judged by the existing legal regime that is, the former Constitution.

40. The facts giving rise to this claim occurred before 27<sup>th</sup> August 2010. The petitioner was employed in the police force in 1986 and his pension gratuity paid on 19<sup>th</sup> December 2008. The acts of discrimination upon which the petition is grounded occurred within this period. This means that it is the former Constitution that must be applied to judge his case.

41. Counsel for the petitioner submitted that **section 6** of the **Sixth Schedule** to the Constitution stipulates that all rights and obligations however arising of the Government or the Republic subsisting immediately before the effective date shall continue as rights and obligations of the national government and or the Republic. In the circumstances, counsel argued that the state had an obligation immediately before the effective date to protect the petitioner against discrimination under the **Persons with Disabilities Act** hence the Constitution was applicable.

42. I do not read the provisions of the **Sixth Schedule** as entitling the court to retrospectively apply the Constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former Constitution particularly **section 82** which prohibits discrimination.

43. Counsel for the petitioner has also referred to the provisions of **Article 23(1)** and **165** which read together entitle any person apply to the court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this court to adjudicate violations of the Constitution but they do not empower the court to apply Constitution retrospectively.

### **Discrimination under section 82 of the Constitution**

44. The petitioner's case must now be determined in reference to the former Constitution. The material part of **section 82** of the former Constitution provides as follows;

**82. (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.**

**(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.**

**(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.**

45. The definition of discrimination at **section 82(3)** was limited to classifications of, “**race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex.**” There was no protection for discrimination on account of disability. The only way to include disability as a prohibited form of discrimination is to read disability as being prohibited on account of “*other local connexion.*”

46. The argument whether **section 82(3)** includes other categories of discrimination was considered in the case of ***RM (suing through next friend JK) v Attorney General (2008) 1 KLR (G & F) 574.*** One of the questions for consideration was whether discrimination of a child born out of wedlock was contrary to **section 82(3)** of the former Constitution. The court was invited to go beyond the categories set out in **section 82(3)**. The court declined this invitation and observed, “*In interpreting our Constitution we consider ourselves bound by its provisions in the matter before us namely s. 82 and its limitations. Perhaps it is important to point out at the outset, that following the great momentum of gender equity in the 80’s and 90’s, s 82 of the Constitution was amended in 1997 and the prohibited category expanded to include “sex”. Age and marital status were not added. At the moment we can only conclude that the exclusion was deliberate and we do not consider it the function of the Court to fill the gaps.*”

47. The court is obliged to give a broad and purposive interpretation to the Constitution that enhances the protection of fundamental rights and freedoms but such an interpretation must be founded on the words of the Constitution. Any other approach would amount to usurping the constituent power of the people enshrined in the Constitution.

48. To include a prohibition based on disability in the definition of “*other local connection*” would also be inconsistent with the language of **section 82(2)**. The use of local connexion must be read together with race, tribe, place of origin or residence and connotes reference to a place. The forms of disabilities are infinite and various and do not necessarily have a connection with a place or at any rate it has not been shown that the disability subject of this suit relates to a place or origin or locality.

49. I conclude that the former Constitution is not applicable to the facts and circumstances of this case and therefore the petitioner cannot claim breach of his rights on the basis on **section 82** thereof. The enactment of protections of persons with disability in **Article 27** of the Constitution is recognition of the fact that the former Constitution was deficient in so many respects including limiting the protections afforded to persons with disability.

### **The Persons with Disabilities Act and application of International Instruments**

50. The petitioner has a right not be discriminated against by the State and the State had an obligation to protect the petitioner under the ***Persons with Disabilities Act***. This Act was enacted in 2003 and was intended to specifically provide for rights of persons with disabilities which were lacking protection in the former Constitution. Though the Act is an elucidation of rights of persons with disabilities, it is a separate statutory regime and to be read and applied within the statutory context.

51. **Article 19(3)** provides that the Bill of Rights does not exclude other rights and fundamental

freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights. This means that other rights conferred by statutes like the **Persons with Disabilities Act** and the **Childrens Act** can be enforced independently of the Bill of Rights and so also international treaties and conventions which confer certain rights and which are applicable by virtue of **Article 2(6)**.

52. The question that needs to be answered is whether “*other rights and fundamental freedoms not in the Bill of Rights*” but recognized under **Article 19(3)(b)** can be enforced by a petition filed under **Article 22** of the Constitution. **Article 22(1)** provides;

***(1) Every person has the right to institute proceedings in claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*** [Emphasis Mine]

53. Kenyans have considered certain rights and fundamental freedoms so important and given special protection and status in the Constitution. These rights and fundamental freedoms referred to in **Article 22(1)** are to be found in **Part 2 of Chapter Four** of the Constitution, **Articles 26 to 51** inclusive. They are specifically defined and as part of the Constitution, they take precedence over any laws, policies and measures of the State and its organs.

54. The importance of these rights and fundamental freedoms is underpinned by the fact that under **Article 23**, the High Court is entitled to frame appropriate relief including reliefs set out in **Article 23(3)** to give effect to these rights. Since these freedoms are part of the Constitution any law that that is in conflict with or is inconsistent with the Bill of Rights must yield and be declared unconstitutional.

55. Other rights and fundamental freedoms recognized by **Article 19(3)(b)** do not enjoy the same status as those found in the Bill of Rights and cannot be elevated to the same status without an amendment of the Constitution. The nature and extent of these rights and the reliefs in respect breach thereof and the procedure for enforcement must be determined in the context of the respective statutory instruments, treaties or conventions.

56. It is clear that the right conferred by **Article 22** is only for the purpose of enforcing fundamental rights and freedoms in the Bill of Rights. The right is not conferred for the purpose of litigating other matters unconnected with the enforcement of the Bill of Rights. If the court hearing such an application concludes that there is no violation of the Bill of Rights then that is the end of the matter.

57. My sentiment should not be taken as endorsing the view that rights and fundamental freedoms, whether under protected by the Constitution or other instruments, exist in pigeon holes, isolated from each other. Indeed **Article 19** reinforces the universality and indivisibility of human rights and fundamental freedoms. All rights are interdependent and reinforce each other. **Article 22** merely gives a special right to a party to move the High Court to protect a special class of rights.

58. I would therefore conclude in the circumstances, an application filed under **Article 22** of the Constitution cannot be form the basis of a claim under the **Persons with Disabilities Act** or **the Convention on the Rights of Persons with Disabilities**. These rights must be litigated or enforced in another forum save where the enforcement is incidental to the enforcement of the rights contained in the Bill of Rights.

### **Disposition**

59. It is therefore with regret that I must hold that the petitioner cannot agitate his claim under the Constitution. **Section 82** of the former Constitution, which is applicable to the petitioner claim, does not offer protection for discrimination based on disability.

60. In the circumstances, I therefore strike out the petitioner's case but with no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 19<sup>th</sup> day of June 2012

**D. S. MAJANJA**

**JUDGE**

Mr Chigiti instructed by Chigiti & Chigiti Advocates for the petitioner

Mr Kakoi, Litigation Counsel, instructed by the State Law Office for the respondents.



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