



Case Number:	Petition 157 of 2011
Date Delivered:	02 Aug 2012
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Isaac Lenaola
Citation:	FREDRICK GITAU KIMANI V ATTORNEY GENERAL & 2 OTHERS[2012]eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;">Recognition as a person with disability</p> <p style="text-align: center;">Reported by Michael M. Murungi</p> <p><i>Constitutional Law – bill of rights – right not to be discriminated against – discrimination on grounds of disability, heal and age – right of a person with disability to be recognized as such – right of a person with disability to have his retirement age extended from 55 years to 60 years - Constitution of Kenya, 2010 Article 27(4), (5), (6), (7) – Persons With Disabilities Act, Act. No. 14 of 2003, section 15(6).</i></p> <p><i>Constitutional Law – breach of constitutional rights – compensation – nature of the remedy for such breach and how the remedy may be invoked – duty of petitioner to establish the facts supporting the compensation claimed – general damages – nature of the remedy and how it may be granted in such cases – Constitution of Kenya, 2010 section 23(e)</i></p>

Issues:

- i. Had the petitioner's right to be recognized as a person with disability and to have his retirement age extended from 55 years to 60 years under the Persons With Disabilities Act, Act. No. 14 of 2003, section 15(6) been violated?
- ii. Had the petitioner's right not to be discriminated against on grounds of disability, health and age under Article 27(4), (5), (6) and (7) of the Constitution of Kenya 2010 and Article 7 of the Universal Declaration of Human Rights been violated?
- iii. How is a claim for a remedy for the breach of a constitutional right to be made and proved?

Constitution Kenya, 2010 Article 27(4): "The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

Persons With Disabilities Act, Act No. 14 of 2003, section 15(6): "(6) The minimum retirement age for persons with a disability shall be sixty years."

Held:

1. Discrimination is subtle but can manifest itself in many forms and the State is obligated to eradicate it by inter-alia procedural fairness. The petitioner appears to have been retired both because of his age and his disability and in spite of the fact that he had given his employer due notice of his disability and of his entitlement to have his age of retirement reckoned at 60 years under the Persons With Disabilities Act section 15(b).
2. The Petitioner's right not to be discriminated against under Article 27(4)(5)(6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights has been violated. There was no procedural fairness when his

	<p>request for extension of his retirement age was not responded to and least of all, acknowledged.</p> <p>3. The failure by the 2nd and 3rd respondents to recognize the petitioner as a disabled person and to extend the petitioner's retirement age from 55 years to 60 years in total disregard of section 15(6) of the Persons With Disabilities Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability.</p> <p>4. As a result of these breaches, the petitioner has been unfairly treated and subjected to serious economic hardship and thus deprived of his right to livelihood.</p> <p>5. Even though general damages are the preserve of the Court as they are discretionary, specific claims must be specifically pleaded and proved even in matters of a constitutional nature. A person cannot be paid for services that he has not rendered. There was no evidence that the petitioner was earning the amount of money that he had claimed.</p> <p>6. Where a person makes a claim but fails to show in a satisfactory manner the facts upon which he bases his claim, the respondent is under no obligation to prove his defence or exception.</p> <p>7. The remedy for breach of one's constitutional rights is clearly set out in Article 23(e) of the Constitution and whether pleaded or not, the fact of breach of a fundamental right will in appropriate cases attract the remedy and it is a remedy at the discretion of the Court.</p> <p><i>Orders accordingly, petitioner to be paid Kshs. 500,000 being general damages at large as compensation by the 2nd and 3rd respondents.</i></p>
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-

History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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FREDRICK GITAU KIMANI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTRY FOR STATE & PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....2ND RESPONDENT

THE POLICE COMMISSIONER.....3RD RESPONDENT

J U D G M E N T

1. The Petitioner herein, Fredrick Gitau Kimani was until his retirement in March 2004, a public officer having been employed as such in January 1974. His Petition dated 13th September 2011 is brought pursuant to the provisions of **Article 27(4)(5) and (6) of the Constitution** as well as **The Persons With Disabilities Act, Cap.14, Laws of Kenya**.

2. He seeks the following Orders;

“(a) A declaration that the Petitioner’s right not to be discriminated against under Article 27(4)(5)(6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights has been violated.

(b) A declaration that failure by the 2nd and 3rd Respondent in extending the Petitioner’s retirement age from 55 years to 60 years in total disregard to the provisions of Section 15(6) of the Persons With Disability Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability.

(c) A declaration that failure by the 2nd and 3rd Respondents in recognizing the Petitioner as a disabled person pursuant to Section 15(6) of the Persons With Disabilities Act, Chapter 14 Laws of Kenya, is discrimination against the Petition, hence a violation of his right as a fore-mentioned.

(d) A declaration that as a result of the breaches afore-mentioned, the Petitioner has been unfairly treated and subjected to serious economic hardship thus deprived of his right to livelihood.

(e) A declaration that the Petitioner is entitled to payment of Kshs.358,540/- tabulated at Kshs.15,448.00/- per month being the amount in arrears he would have otherwise earned had his rights not been violated for five (5) years until the retirement age of sixty (60).

(f) The Petitioner be awarded interest from the accrual date.”

3. His case is as follows; that he served the Republic of Kenya as above until March 2004 when he was relieved of his duties on medical grounds. At the time he was a Prosecutor at the Voi Law Courts and while attending treatment for an illness, he was diagnosed with diabetes and later while hospitalized at Kiambu District Hospital, his left leg had to be amputated and he was forced upon being discharged in March 2006, to have an artificial limb fitted.

4. Thereafter, the National Council for Persons with Disabilities certified him as a person with disability and the 2nd and 3rd Respondents were so informed by letter dated 8th November 2007.

5. The Petitioner thereafter received a letter dated 2nd March 2007 from the 3rd Respondent expressing the decision that the Petitioner had to retire upon attaining the mandatory age of 55 years and on 13th March 2007, the retirement was confirmed a few weeks before the due date.

6. It is his complaint that the above action amounted to discrimination on the grounds of health, status, age as well as disability which was a direct violation of **Article 27(4)** of the **Constitution** as read with **Section 15(6)** of the **Persons with Disabilities Act**.

7. That therefore this Court has a duty to protect him as is its obligation under **Articles 20(3), (b), 22(1)** and **23** of the **Constitution**.

8. I have taken into accounts the contents of his Supporting Affidavit sworn on 13th September 2011 as well as the Further Affidavit sworn on 27th February 2012 and the annexures to the former and I have understood the gist of his complaint.

9. The Respondents filed a joint response contained in the Replying Affidavit sworn on 1st February 2012 by Charlton Muriithi, Director in-charge of Personnel in the Kenya Police Service and their case is as follows;

10. That the Petitioner voluntarily retired from the Service on 21st April 2007 and *“he ought to have started the process of requesting for extension of his retirement early enough”*. He only did so on 11th April 2007 and that because he accepted the retirement, received his full retirement dues, then his case is an abuse of the Court process and his case should be dismissed.

11. On my part, the case portends no difficulty at all for the following reasons;

12. Firstly, **Article 27(4)** of the **Constitution** provides as follows;

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

13. I have read the letter dated 6th February 2007 from the 3rd Respondent giving the Petitioner notice that he was to retire with effect from 21st April 2007 upon attaining fifty five (55) years. Other letters dated 2nd March 2007 and 13th March 2007 respectively contained the same information. The Petitioner, by his letter dated 11th April 2007 advised the 3rd Respondent that he was a beneficiary of **Section 15(6)** of the **Persons With Disabilities Act** and so his retirement ought to be sixty (60) years and not fifty five (55) years.

14. He had previously done the same vide his letter dated 27th June 2006 but it is clear from the

record that the 3rd Respondent failed to respond to that issue completely. To argue at this stage that the Petitioner was not vigilant is mischievous, to say the least. He clearly knew the Law, advised his superiors of it but no response was given.

15. **Section 15(6)** of the **Persons With Disabilities Act** provides as follows;

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) “The minimum retirement age for persons with a disability shall be sixty (60) years”.

16. Reading **Article 27(4)** above as well as **Section 15(6)**, together with the annexures to the Petitioner’s Affidavits, nowhere is there any record that the retirement of the Petitioner was instigated by the fact that he was disabled. In all letters addressed to him, the reason given for his retirement was that he had reached the retirement age “*in accordance with service regulations*”. However, reading his letters pointing out that he was disabled and required to be treated as such, would raise the issue that he may have been retired both because of his age and also because of his disability and in spite of his vigilant action to point to **Section 15(b)** aforesaid. Discrimination is subtle but can manifest itself in many forms and the State is obligated to eradicate it by *inter-alia* “*procedural fairness imposed*” upon it– see Regan J. in Premier, Mpumalanga & Anor vs. Executive Committee, Association of State-Aided Schools, Eastern Transvaal [1998] ZACC 20.

17. In the instant case, I do not see that there was procedural fairness when his request for extension of his retirement age was not responded to and least of all, acknowledged.

18. I have stated as above because if the Police Service had any problem with the Petitioner’s ability to work in spite of his disability, the answer would have expressed itself within **Section 156(2)** but the Service has not addressed the matter including in present proceedings and so it is moot.

19. For all the above reasons I am prepared to agree with the Petitioner that he was discriminated against and in any event, even if it was not so expressed, a blatant disregard of **Section 16(6)** would point me to that conclusion.

20. I shall grant **Prayers (a), (b), (c) and (d)** of the Petition as prayed and for reasons given.

21. Regarding **Prayers (e) and (f)** thereof, I do not understand it to be the Law that one can be paid for services not rendered. In any event, throughout the proceedings, no evidence was tendered to show that the Petitioner was earning Kshs.15,448/- per month. It is becoming increasingly common in this Court, that parties invoke the Constitution, claim monetary compensation but completely fail to show the basis for the specific figures pleaded. Granted, general damages are the preserve of the Court as they are discretionary, but specific claims must be specifically pleaded and proved even in matters of a Constitutional nature.

This case is a classic example of the laxity of Parties and their advocates in keeping to the old maxim that **“he who alleges must prove” - or “he who asserts, not he who denies must prove” – “ei incumbit probatio qui dicit, non qui negat”.**

22. Where a person makes a claim but fails to show in a satisfactory manner the facts upon which he bases his claim, the Respondent is under no obligation to prove his defence or exception.

23. **Should I then award the Petitioner any compensation for breach of his rights**" As I understand it, the remedy is clearly set out in **Article 23(e)** of the **Constitution** and whether pleaded or not, the fact of breach of fundamental right will in appropriate cases attract the remedy and it is a remedy at the discretion of the Court. In this case, the Petitioner would have retired on 21st April 2012 and not 21st April 2007. He has certainly suffered hardship and my view is that a global sum of Kshs.500,000/- would be adequate compensation for his troubles.

24. In the event, I will allow the Petition and grant the following Orders;

“(a) That the Petitioner’s right not to be discriminated against under Article 27(4)(5)(6) and (7) of the Constitution and Article 7 of the Universal Declaration of Human Rights has been violated.

(b) That failure by the 2nd and 3rd Respondent in extending the Petitioners retirement age from 55 years to 60 years in total disregard to the provisions of Section 15(6) of the Persons With Disability Act amounted to a violation of his right not to be discriminated against on grounds of health, age and disability.

(c) That failure by the 2nd and 3rd Respondents in recognizing the Petitioner as a disabled person pursuant to Section 15(6) of the Persons With Disabilities Act, Chapter 14 Laws of Kenya, is discrimination against the Petition, hence a violation of his right as a fore-mentioned.

(d) That as a result of the breaches afore-mentioned, the Petitioner has been unfairly treated and subjected to serious economic hardship thus deprived of his right to livelihood.

(e) He shall be paid Kshs.500,000/- as compensation by the 2nd and 3rd Respondents jointly and severally.

(f) Costs shall also be paid to the Petitioner by the 2nd and 3rd Respondents jointly and severally”.

25. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2nd DAY OF AUGUST, 2012

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – court clerk

Mr. Odera for Petitioner

Mr. Ojwang for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

By consent

Stay is granted for 30 days.

Copies of the judgment to be supplied on payment

ISAAC LENAOLA

JUDGE

2/8/2012



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