

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E085 OF 2024

BETWEEN

CHARLES CHEGE GITAU.....
PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST
RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT

FEDERATION OF KENYA
EMPLOYERS.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 15th February 2024 is supported by the Petitioner's affidavit in support of similar date and rejoinder dated 6th March 2024.
2. The Petition challenges the 2nd and 3rd Respondents reliance on Section 79 (1) & (2) and 80 of the Public Service Commission Act as read with Section 70 of the Public Service Commission Regulations, 2020 which he contends discriminates and renders jobless classes of people certain age on the basis of mandatory retirement age.

3. The Petitioner argues that the 2nd and 3rd Respondents' actions are discriminatory and violate Article 27(4) of the Constitution as well as Articles 28, 41(1), 57(a) of the Constitution and are therefore unconstitutional.
4. The Petitioner thus seeks the following reliefs:
 - a) ***A declaration that the Respondents jointly and severally violates the Right to equality and freedom from discrimination contrary to Article 27, right to human dignity contrary to Article 28, Article 41 (1) Right to Fair Labour Practices Action, Article 57(a) of the Constitution to fully participate in the affairs of society.***
 - b) ***A declaration that the mandatory retirement age in both private and public sector is unlawful.***
 - c) ***An order of mandamus to compel the 1st and 2nd Respondent to remove the legal retirement limit.***
 - d) ***An order directed at the 2nd and 3rd Respondents compelling the said Respondent to unconditionally allow public and private servants to work beyond the age of 60 years and earn their remuneration thereto.***
 - e) ***Costs of this Petition.***
 - f) ***Any other relief or orders that this Court shall deem just and fit to grant.***

Petitioner's Case

5. The Petitioner argues that by dint of Section 79(1) & (2) and 80 of the Public Service Commission Act as read with Section 70 of the Public Service Commission Regulations, the 2nd Respondent sets the mandatory retirement age as 60 years and 65 years for a person living with disability.
6. It is argued that by setting a mandatory retirement age to settle the employment crisis in Kenya, the 2nd Respondent failed the test set out under Article 24(1)(e) of the Constitution. This is because there are other less restrictive options for jobs creation to the youths instead setting a mandatory retirement limit. Furthermore, he argues that Article 55(c) of the Constitution that provides for affirmative action was not meant to cure one discriminative act while creating another that transgresses Article 27(4) of the Constitution.
7. Additionally, the Petitioner postulates that the narrative that old age equals to unproductiveness thus necessitating retirement contradicts Regulation 70 (1)(c) Public Service Regulations, 2020 which grants special treatment to senior university lecturers and researchers in particular institutions. Equally, Article 167(1) of the Constitution which sets the retirement age of judges to 70 years and Article 137 of the Constitution regarding the President of Kenya.
8. The Petitioner also adds that members of the National Assembly and Senate do not have a retirement age.

Likewise, it was noted that the 2nd Respondent's Chairman who was 63 years at the time had carried out his duties in the most prudent manner even causing the 2nd Respondent to receive accolades both locally and internationally. Thus, in sum this argument is adjudged to be unfounded.

9. The Petitioner further alleges that the 3rd Respondent has also relied on the impugned provisions meant for the public sector to force its personnel to also retire at these ages, yet the same lacks rational legal basis.
10. The Petitioner on this premise brings this claim against the impugned provisions and contends that the mandatory retirement age in both the private and public sector is unlawful.

1st Respondents' Case

11. In response to the Petitioner's case, the 1st Respondent filed grounds of opposition dated 30th July 2024 on the basis that:
 - i. *This Court lacks jurisdiction to hear and determine this Petition as the Petitioner's claim can be remedied at the Employment and Labour Relations Court established under Article 162 of the Constitution as read together with Section 12 of the Employment and Labour Relations Court Act. In the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & Another, the Court held that a Courts Jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of law can only exercise Jurisdiction as conferred by the Constitution or other written Law.*

It cannot arrogate itself Jurisdiction exceeding that which is conferred upon it by Law.

- ii. The issue of employees' retirement upon attainment of 60 years falls within the purview of the Employment and Labour Relations Court as stated in the case of National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others that the Employment and Labour Relations Court has jurisdiction to hear and determine constitutional issues that arise from an employer-employee dispute.*
- iii. The Petition is incompetent and misconceived as the Petitioner has not demonstrated with precision how their constitutional rights have been violated thus falling short of the threshold in Mumo Matemu Vs Trusted Society of Human Rights Alliance and 5 Others (2003) eKLR.*
- iv. The Petition is frivolous, vexatious and an abuse of the Court process.*

12. The 1st Respondent indicated that it had a Preliminary Objection however the same is not in the Court file or Court Online Platform (CTS).

2nd Respondent's Case

13. In response to the Petition, the 2nd Respondent also filed grounds of opposition dated 28th February 2024 on the premise that:

- i. The 2nd Respondent is a constitutional Commission established under Article 233 of the Constitution with its functions and powers provided for in Article 234 of the Constitution.*

- ii. Pursuant Article 234(2)(j) of the Constitution, Parliament conferred powers to the Commission in the Public Service Commission Act, 2017 and made further provisions with regard to the management of human resource in the public service.
- iii. Section 79(1)(a) of the Public Service Commission Act provides that a public officer may retire from the public service on attainment of the mandatory retirement age as may be prescribed by regulation.
- iv. Section 80(1)(a) of the same Act provides that upon attainment of the mandatory retirement age as prescribed in regulations; a public officer shall retire from the service with effect from the date of attaining the mandatory retirement age.
- v. Section 92 of the Public Service Commission Act gives power to the Commission to make regulations for the better carrying into effect the provisions of the Act. Pursuant to this power, the Commission made the Public Service Commission Regulations, 2020.
- vi. Regulation 70 of the said Regulations prescribes the mandatory retirement age as 60 years and 65 years for persons with disability.
- vii. Article 27 of the Constitution is not an absolute right and may be limited by legislation pursuant to the provisions of Article 24 of the Constitution.
- viii. Article 24 (1) (d) of the Constitution allows the limitation of rights taking into account the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.

- ix. *Article 55(c) of the Constitution provides that the State shall take measures, including affirmative action programmes, to ensure that the youth access employment.*
- x. *Additionally, Article 27(6) of the Constitution provides that the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*
- xi. *With regard to employment, while all persons have a right to employment, there is always need to balance the right of employment of the youth and the right of employment of other older persons in the society. It is for this reason that employment in the public service cannot be for life as the State is required by the Constitution to provide employment for the youth through affirmative action programmes and policies including the policy on a specific retirement age in the public service that would give opportunity to the youth to also be employed to serve in the public service.*
- xii. *The provisions of Sections 79 and 80 of the Public Service Commission Act and Regulation 70 of the Public Service Commission Regulations are therefore in conformity with the provisions of Articles 24, 27(6) and 55(c) of the Constitution as the State has an obligation to ensure employment opportunities for the youth.*
- xiii. *Allowing this Petition would have the effect of allowing persons to work until death in old age which is not humanly possible as the ability of a human being to be productive both physically and mentally diminishes with age.*
- xiv. *Additionally, the effect of allowing this Petition would be to lock out the youth from employment*

as there would be none or limited opportunities for employment if employees were to be allowed to work until death in old age.

- xv. *This Petition is therefore misconceived and lacking in merit and should be dismissed with costs to the 2nd Respondent.*

3rd Respondent's Case

14. The 3rd Respondent's response to the Petition is not in the Court file or Court Online Platform (CTS) however, this party made a response through its written submissions.

Petitioner's Submissions

15. The Petitioner filed submissions dated 9th July 2024 and underscored the issue for determination as: *whether Section 79(1), Section 80(1) of Public Service Commission Act No 10 of 2017 and Section 70 of Public Service Regulations of 2020 is unconstitutional by dint of Article 27(4) of the Constitution.*
16. The Petitioner submitted that the Constitution under Article 27(4) of the Constitution prohibits the State from discriminating directly or indirectly against any person by virtue of age in this matter. In making this determination Counsel submitted that the Court be guided by principle in **U.S. vs Butler 297 U.S. 1 (1936).**
17. The Petitioner argued that a reading of Article 27(4) of the Constitution against the impugned provisions makes it plain that they are discriminatory on the basis of age. It was argued that the discrimination was not justified by the 2nd

Respondent as is required under Article 24 of the Constitution.

18. Reliance was placed in **Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others [2015] eKLR** where it was held that where a party invokes Article 24(1) of the Constitution as its solace for violating a right the party is still bound to satisfy the Court on all other elements of Article 24(1) that the justification is reasonable in an open and democratic society.
19. The Petitioner contended that the discrimination was not justified as the 2nd Respondent had not provided any statistics, law or regulations that shows that for every retiring person the position is strictly occupied by a youth. As such, the differentiation on the ground of age by the 2nd Respondent is stressed to be contrary to the legitimate government purpose as seen in **Sali vs. National Commissioner of the South African Police Service and Others [2014] ZACC 19.**
20. Reiterating his averments in the Petition, the Petitioner argued that the impugned provisions are contradictory to Regulation 70(1) (c) of the Public Service Regulations, 2020, Article 137 and 167(1) of the Constitution.
21. The Petitioner submitted that the Respondents should consider comparative jurisdictions such as United Kingdom, United States of America, Canada among others as a benchmark on the topic of mandatory retirement age. Reliance

was placed in **Mboya v Attorney General; National Employment Authority (Interested Party) (Petition E335 of 2023) [2024] KEHC 2240 (KLR)** where it was held that:

“Discrimination on grounds of age is explicitly proscribed by the Constitution. In addition, the National Employment Authority Act lists one of its objectives under Section 3 (e) as being to “facilitate and promote equity and diversity, and eliminate discrimination in the employment of Kenyans.” It is therefore a paradox that the same Act goes ahead to make a daring move of dividing Kenyans in the working age population along the line of age by isolating a certain age category for grant of an employment opportunity while excluding the other from that opportunity in flagrant violation of an express Constitutional provision. Affirmative action is not an excuse for violating an undoubted constitutional principle however well-meaning it might be. I find that Section 17 (2) (d) of the National Employment Authority Act No. 3 of 2016 contravenes the principle of providing equal access of opportunities to Kenyans in the working age population. It is discriminatory, unconscionable, null and void.”

22. Like dependence was placed in **Githunguri vs. Republic KLR (1986)**.

23. The Petitioner in conclusion maintained that the impugned provisions are unconstitutional as violate Article 27(4) of the Constitution.

1st Respondent's Submissions

24. The 1st Respondent in opposition to the Petition filed submissions dated 30th July 2024 to its Preliminary Objection and set out the single issue for discussion as: *whether this Court has jurisdiction on the matter.*
25. Counsel relying in **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1** emphasized that jurisdiction is everything as without it a Court has no power to make one more step. In this regard, Counsel argued that this Court lacks jurisdiction to entertain the matter by virtue of Article 162 (2) of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act which grants the Employment and Labour Relations Court jurisdiction to entertain such disputes.
26. Counsel relied in **Jane Frances Angalia v Masinde Muliro University of Science and Technology and Others (2010) eKLR** where it was observed that Courts of equal status as the High Court have jurisdiction to deal with any constitutional issue in a matter in which they have jurisdiction over.
27. Counsel submitted that the Petitioner challenges the mandatory retirement age which falls under the purview of

the Employment and Labour Relations Court. Reliance was placed in **Sollo Nzuki vs. Salaries and Remuneration Commission & 2 others (2019) eKLR** where the Court held that:

“51. Similarly, pursuant to Article 23(3) of the Constitution as read with Section 12(3) of the Employment and Labour Relations Court Act, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. The Court cannot therefore purport to entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matter and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialized courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of Petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court’s jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the High Court to decline jurisdiction since it would mean that in that

event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provision of Article 159 of the Constitution.”

28. Similar dependence was placed **in Law Society of Kenya v Federation of Kenya Employers [2021] eKLR.**

2nd Respondent’s Submissions

29. The 2nd Respondent’s Counsel, Jacqueline Manani filed submissions dated 18th November 2024 and highlighted the issue for discussion as: *whether Sections 79(1) and 80 of the PSC Act and Regulation 70 of the PSC Regulations violate Articles 27(4), 28 and 41(1) of the Constitution.*
30. Counsel commenced by stating that every Act of Parliament is presumed constitutional and the burden to prove otherwise lies on the Petitioner. Counsel noted that in determining this question the Court is to be guided by the object, purpose and effect of the impugned provisions.
31. Reliance was placed in **Institute of Social Accountability & another v National Assembly & 4 others [2015] KEHC 6975 (KLR)** where it was held that:

“This Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its

judicial authority, this Court is obliged under Article 159(2) (e) of the Constitution to protect and promote the purpose and principles of the Constitution.”

32. Counsel submitted that the Petitioner had failed to discharge the burden of proving that the impugned provisions are unconstitutional. Counsel contended that the Petitioner had argued that the provisions are discriminatory yet failed to make a comparison against what the discrimination was claimed to be. To support this point, reliance was placed in **Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)** where it was held that:

“discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex, disability etc or due to unfair practice and without any objective and reasonable justification.”

33. Counsel submitted that the issue in contention is the existence of a mandatory retirement age in both the private and public sector. Counsel pointed out that there was no allegation that there are certain categories of Kenyans who retire later thereby discriminating against another category of Kenyans who retire at 60 and 65 years. As such, Counsel stressed that it was clear that all Kenyans are treated equally on this subject thus the claim of discrimination is unsubstantiated and further not proved as alleged.

34. Counsel added that the Petitioner had not demonstrated how retirement of all persons at the age of 60 or 65 causes them to be marginalized, ignored or devalued. Counsel posited that on the contrary, it is the Kenyan youth who would be marginalized, ignored or devalued if this Court were to find that there should not be a retirement age.

35. Counsel in like manner submitted that the Petition in alleging violation of Article 28 of the Constitution had failed to demonstrate how the provisions on retirement age violate the right to human dignity. Similar arguments were registered in relation to Article 41(1) of the Constitution. Reliance was placed in **Law v Cananda (Ministry of Employment and Immigration), 1999 (1) RCS** where it was held that:

“Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and it is enhanced when laws recognize the full place of all individuals and groups within society.”

36. Counsel noted that prior to acceptance of employment terms either on permanent and pensionable, a person either accepts or declines the terms. As such a person is bound by the contract terms thereafter. Counsel contended that there was nothing unconstitutional about providing certainty by stating the duration of an employment contract and providing a term limit.

37. Counsel equally pointed out that the Constitution also sets a time limit for Judges under Article 167(1) of the Constitution. In this regard, Counsel postulated that should this Court find that the impugned provisions are unconstitutional it would then mean that this Article is also unconstitutional for setting a time limit for retirement.
38. In sum, Counsel submitted that the Petitioner had failed to meet the threshold for a finding that the impugned provisions violate the Constitution and thus Petition lacks merit.

3rd Respondent's Submissions

39. The 3rd Respondent in opposition to the Petition filed submissions dated 11th March 2025.
40. The 3rd Respondent contended that the set mandatory retirement age by the 2nd Respondent is not discriminatory and is in line with its mandate as empowered under Article 233 of the Constitution and as read with Section 92(2)(f) of the Public Service Commission Act.
41. Furthermore, Counsel submitted that the International Labour Organization (ILO) similarly recognizes the legitimacy of the mandatory retirement ages set by national governments as provided under Paragraph 5 (2) of the Older Workers Recommendation, 1980 (No. 162). This is also

echoed under Article 1 (2) of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

42. It was noted that while the ILO, advocates against unjust age discrimination, it acknowledges that setting a mandatory retirement age does not inherently constitute discrimination, provided it is justified by legitimate objectives and established through national laws or policies.
43. The 3rd Respondent further submitted that the Courts have held that the retirement age must accord with the national ethos and policies in place that answer to various parameters including micro and macro-economic dynamics, sectoral needs, considerations for individuals with special and rare skills and knowledge, pension scheme administration among others.
44. Dependence was placed in **Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers v Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA) & 2 others; Ministry of Education & 3 others (Interested Parties) [2021] KEELRC 2298 (KLR)** where it was held that:

“The SRC guidelines which this court is enjoined to consider while dealing with matters that fall under the purview of SRC, provide that among the parameters to

be considered in negotiations are Government Policies and Guidelines. The SRC guidelines provide –

8. Government Policies and Guidelines: Collective Bargaining Negotiations should adhere to existing policies and guidelines such as the Minimum Wage Guidelines/ Public Service Commission Human Resource Policies and Procedures Manual State Corporation guidelines and various SRC advisories.

Parties can therefore not negotiate outside public policy and guidelines.

For these reasons the proposals for amendment of retirement age are expunged from the CBAs. The current practice as set out in the pension schemes for universities/ the policies and guidelines in place and the provisions of any law that governs retirement age in the public sector shall apply.”

45. The 3rd Respondent moreover contended that the Petitioner’s allegations on discrimination concerning the mandatory retirement age had not been substantiated thus this burden had not been discharged in line with Section 109 of the Evidence Act.
46. The 3rd Respondent noted that the 2nd Respondent is primarily responsible for overseeing human resource development within the public sector while the 3rd Respondent operates within a different legal framework governed by the Employment Act. In essence, it was noted that the private sector employers have the autonomy to establish their own employment terms through their

agreements with their employees. To that end, Counsel submitted that the Petition lacks merit.

Analysis and Determination

47. It is my considered take that the issues that arise for determination in this matter are as follows:

- i. Whether this Court has jurisdiction to entertain this matter.***
- ii. Whether Sections 79(1) and 80 of the PSC Act and Regulation 70 of the PSC Regulations are unlawful and unconstitutional in view of Articles 27(4), 28 and 41(1) of the Constitution.***
- iii. Whether the Petitioner is entitled to the relief sought.***

1st issue- Whether this Court has jurisdiction to entertain this matter

48. The 1st Respondent contended that this Court lacks jurisdiction to hear and determine this matter citing Article 162 (2) of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act which grants the Employment and Labour Relations. The 1st Respondent argued that a dispute on mandatory retirement age falls within the jurisdictional competence of the Employment and Labour Relations Court and given the reasoning in **Sollo**

Nzuki vs. Salaries and Remuneration Commission & 2 others (2019) eKLR .

49. The Supreme Court **In the Matter of the Interim Independent Electoral Commission [2011] KESC 1(KLR)** guided as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

50. In the same way the Court of Appeal speaking to this issue in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others** **[2013] KEHC 5855 (KLR)** opined as follows:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.

The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a cause was best captured in the case of The Owners Of The Motor Vessel Lillian ‘S’ Vs. Caltex Kenya Ltd [1989] KLR 1.”

51. The jurisdiction of the special courts is provided for under Article 162(2)(b) of the Constitution which states as follows:

- 1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- 2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a) employment and labour relations; and

b) the environment and the use and occupation of, and title to, land.

3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

52. To give effect to Article 162 (3); Parliament enacted the Employment and Labour Relations Act in which section 12 defines the jurisdiction of the Court as follows:

1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

a. disputes relating to or arising out of employment between an employer and an employee;

b. disputes between an employer and a trade union;

c. disputes between an employers' organisation and a trade union's organisation;

d. disputes between trade unions;

e. disputes between employer organisations;

f. disputes between an employers' organisation and a trade union;

g. disputes between a trade union and a member thereof;

- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.

53. The Court in **Sollo Nzuki (supra)** rendered itself thus:

“Similarly, pursuant to Article 23(3) of the Constitution as read with section 12(3) of the Employment and Labour Relations Court Act, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of the Constitution as read with section 12 of the Employment and Labour Relations Court Act. The Court cannot therefore purport entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matters and matters related thereto are concerned. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialized Courts. However, as stated above, the Employment and Labour Relations Court may not embark on a generalized handling of petitions but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within the court’s jurisdictional competence and specialization. Accordingly, where the matters raised fall both within their jurisdiction and outside, it would be a travesty of justice for the

High Court to decline jurisdiction since it would mean that in that event a litigant would be forced to institute two sets of legal proceedings. Such eventuality would do violence to the provisions of Article 159 of the Constitution....The Employment and Labour Relation's Court's jurisdiction is restricted to where there exists employer and employee relationship has been the subject of several decisions in our jurisdiction."

54. Additionally, the Court of Appeal in **Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others [2016] KECA 413 (KLR)** held as follows:

"This Court considered the issue in Prof. Daniel N. Mugendi v. Kenyatta University & Others, CA No 6 of 2012 and in Judicial Service Commission v. Gladys Boss Shollei & Another, CA No 50 of 2014, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of the Constitution. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant's claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit."

55. Correspondingly, the Court of Appeal in **Public Service Commission & 4 others v Cheruiyot & 20 others** [2022] KECA 15 (KLR) stated as follows:

“49. In the absence of an employee-employer relationship, it is our considered view that the court that had jurisdiction to entertain and determine the issues raised in the consolidated petitions was in fact the High Court. The establishment of the High Court is found at article 165(1) of the Constitution. Under article 165(3), the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened. Under article 165(d)(i), the High Court has jurisdiction to determine whether any law is inconsistent with or in contravention of the Constitution.

50. The issues raised in the consolidated petitions, especially the issue relating to the constitutionality of section 43(5) of the Elections Act, 2011 are the kind of issues contemplated under article 165(3(d) of the Constitution determination of which would be within the exclusive constitutional mandate of the High Court. This is jurisdiction flowing directly from the Constitution, which the Supreme Court alluded to in the matter of Interim Independent Electoral Commission (supra) and Samuel Kamau Macharia & another (supra).

51. The Constitution appreciates that there are matters within the exclusive jurisdiction of the High Court on the one hand and those reserved and/or falling within the jurisdiction

of the courts contemplated in article 162(2) on the other hand, notwithstanding the fact that the latter courts enjoy the same status as the High Court. This court in *Karisa Chengo & 2 others v Republic* [2015] eKLR held thus:

“...The jurisdiction of the High Court as established under article 165 of the Constitution is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in article 162(2). It is therefore clear that the High Court no longer had the original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under section 12 of the ELRC Act and section 13 of the ELC Act. Conversely, the courts contemplated in article 162(2) of the Constitution cannot deal with matters reserved for the High Court.”

- 52. This court in the *Karisa Chengo* case (*supra*) held that status of a court is not synonymous to jurisdiction. In this context therefore, although the Employment and Labour Relations Court exercises the same power as the High Court in performance of its judicial functions, it has specialized jurisdiction and is not the High Court. It is important to point out that the finding of this court in the *Karisa Chengo* case was upheld by the Supreme Court.**
- 53. Therefore, for want of an employee-employer relationship, we find and hold that the Employment and Labour Relations Court arrogated itself jurisdiction that exceeded**

that conferred upon it by law, which renders its decision nullity ab initio.”

56. The jurisdiction of the High Court under Article 165(3) (d) (i) includes, among others, the determination of ‘*the question whether any law is inconsistent with or in contravention of this Constitution.*’ The dispute before this Court essentially challenges the constitutionality of Statutory of Sections 70 and 80 of the Public Service Commission Act and Regulation 70 of the PSC regulations. This challenge is not founded on an employer/employee relationship as between the Petitioner and the Respondents as none was even shown to exist. Manifestly therefore, this is cannot be a matter falling within the jurisdictional sphere of the Employment and Labour Relations Court contemplated in Article 162 (2) of which the jurisdiction of this Court is specifically barred by dint of Article 165 (5) (b) of the Constitution.
57. The contention by the 1st Respondent that this Court lacks jurisdiction therefore fails.

2nd issue- Whether Sections 79(1) and 80 of the PSC Act and Regulation 70 of the PSC Regulations are unlawful and unconstitutional in view of Articles 27(4), 28 and 41(1) of the Constitution.

58. A determination of this issue will involve interpretation of the Constitution and therefore the applicable constitutional interpretations principles will come into play. The Court in

Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika [2024] KEHC 2890

(KLR) summarized the applicable principles as follows:

“111. The developing precedent on constitutional interpretation from the superior courts has now evolved and coalesced as follows;

- i. Article 259 of the Constitution as a mandatory principle obliges courts to protect and promote the spirit, purposes, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance while permitting development of the law.***
- ii. The Constitution must be construed holistically, liberally, purposively and in a broad manner so as to avoid a narrow and rigid interpretation tainted with legalism.***
- iii. The Constitution must be interpreted in a contextual manner, that courts are constrained by the language used and so cannot impose a meaning that the text is not reasonably capable of bearing. Furthermore, constitutional interpretation does not favour a formalistic or positivistic approach but a generous construction of the text in order to afford the fullest possible constitutional guarantees.***
- iv. In considering the purposes, values and principles while interpreting the***

Constitution, courts must take into account the non-legal phenomena by reflecting on the history of the text.

- v. Constitutional interpretation demands that no one provision of the Constitution should be segregated from the others or be considered alone. The provisions are to be interpreted as an integrated whole so as to effectuate the greater purpose of the Constitution.**
- vi. Where there is an impugned provision in a Statute the same must as much as possible be read in conformity with the Constitution to avoid a clash.**
- vii. The court ought to examine the object and purpose of the Act (Statute) and if any statutory provision read in its context can reasonably be construed to have more than one meaning the court must prefer the meaning that best promotes the spirit and purposes of the Constitution. See *Tinyefuza v Attorney-General* Const Pet No 1 of 1996 (1997 UGCC 3) and *Re Hyundai Motor Distributors (PTY) & others v Social No & others* (2000) ZACC 12 2001(1) SA 545.**
- viii. The principles of interpretation require that the words and expressions used in a statute be interpreted according to their ordinary literal meaning in the statement and in the light of their context. See *Adrian Kamotho Njenga v Kenya School of Law* (2017) eKLR and *Law Society of Kenya v Kenya Revenue Authority & another* (2017) eKLR.”**

112. When the constitutionality of a statute or provision of a statute is called to question, the court is under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the article(s) of the constitution and determine whether it meets the constitutional test. The court must also check both the purpose and effect of the Section or the Act, and see whether any of the two could lead to the provision being declared unconstitutional. That is to say, the purpose of a provision or effect thereof, may lead to unconstitutionality of the statute or provision.”

59. In like manner, the Court in **Gikonyo & another v National Assembly of Kenya & 4 others; Council of Governors & 3 others (Interested Parties) [2024] KEHC 10886 (KLR)** echoed as follows:

... As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in articles 20(4) and 259(1).

55. Article 20(4) requires courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command courts to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights,

permits the development of the law and contributes to good governance...”

60. Furthermore, in **Institute of Social Accountability & another (supra)** the Court observed that:

“56. First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.

57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners.

58. Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011* [2011]eKLR, *Samuel G. Momanyi v Attorney General and Another (supra)*). Further, in examining whether a particular

statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

59. Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in Re The Matter of the Interim Independent Electoral Commission Constitutional Application (supra) at para. 51 adopted the words of Mohamed A J in the Namibian case of State v Acheson 1991(20 SA 805, 813) where he stated that;

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and

disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

60. Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)).

61. We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances...”

61. The gist of this Petition are the provisions of the law that the Petition is challenging on the basis that they fix the mandatory retirement age thus locking from employment critical mass of the population in discriminative manner on account of age which is a violation of Article 27 (4) of the Constitution. It would thus be germane to first set out those provisions that the Petitioner has isolated and assailed through the instant Petition.

62. **Section 79 (1)** of the **Public Service Commission Act, Cap 185** stipulates the grounds for retirement and entitlement to pensions benefits as follows:

‘(1)A public officer may retire from the public service—

- (a) **on attainment of the mandatory retirement age as may be prescribed by regulation;**
- (b) *on attainment of fifty years;*
- (c) *on medical grounds;*
- (d) *where a public office is abolished;*
- (e) *in accordance with a special retirement scheme agreed between a public officer and the relevant lawful authority; or*
- (f) *by voluntary retirement'*

63. **Section 80 provides for retirement on the basis of age, and states as follows:**

- (1) *Where a public officer has attained the mandatory retirement age as may be prescribed in regulations—*
 - (a) *the public officer shall retire from the service with effect from the date of attaining the mandatory retirement age; and*
 - (b) the Commission or other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age.**
- (2) *Despite subsection (1)(b), the Commission or other appointing authority may engage the public officer for service after the retirement upon such terms of contract as may be agreed if —*

- (a) *the public officer possesses rare knowledge, skills and competencies for the time being required in the service;*
- (b) *the retired officer is willing to be engaged on contract; and*
- (c) *the retired public officer's performance shall not in any way be impaired by age.*

64. Regulation 70 of the Public Service Commission Regulations, 2020 provides:

70. (1) *Subject to the Constitution, section 80 of the Act, any other relevant written law or a specific government policy, the mandatory retirement age in the public service shall be— Retirement on age grounds.*
- (a) *sixty years;*
 - (b) *sixty-five years for persons with disability; and*
 - (c) *such age as may be determined by the Commission for lecturers and research scientists serving in public universities, research institutions or equivalent institutions as determined by Commission in consultation with such universities, research institutions or equivalent institutions.*
- (3) *A public officer shall be considered for retirement as a person with disability if the officer—*
- (a) *has a disability of a permanent nature that can be perceived by significant sectors of the*

community and the disability has a substantial impact on the ability of the officer to carry out ordinary day to day activities;

(b) has been registered in the public body's human resource database as a person with disability for at least three years before the date of retirement: Provided that the Commission may consider cases of disability that occur less than three years before the date of retirement; and

(c) is registered by the National Council for Persons with Disabilities and has a tax exemption certificate from the Kenya Revenue Authority as a person with disability: Provided that registration by the Council or possession of a tax exemption certificate shall not be considered as automatic evidence of disability. Kenya Subsidiary Legislation, 2020 43 (3) Where there is doubt as to the disability of a public officer, the Commission shall seek a second medical assessment from a panel consisting of a representative of the Commission and three eminent doctors appointed by the Director-General of Health and the second medical assessment shall supersede any other assessment.

(4) A person shall not be retained in the public service on account of disability beyond the mandatory retirement age without the approval of the Commission.

(5) Subject to the Constitution, the Retirement Benefits Act, 1997, the rules of a retirement benefits scheme or a specific government policy, where an officer attains the mandatory retirement

age while undergoing disciplinary proceedings, the officer shall retire with the applicable pension benefits. No. 3 of 1997.

(6) *Subject to section 80 (2) of the Act, in determining whether to engage an officer after attainment of retirement age, the Commission shall determine and document the rare knowledge, skills or competencies that the officer possesses.*

(7) *In this regulation—*

(a) *“rare knowledge, skills and competencies” means knowledge, skills and competencies that are scarce, unique and not readily available in the job market.; and*

(b) *“disability” means a permanent physical or other impairment or condition that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day to day activities.*

65. It should be underscored that **Article 234 of the Constitution** sets out the function and powers of the Public Service Commission which at Article 234 (2) (g) includes to ***‘review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service.’***

66. The Petitioner contended that Article 27(4) of the Constitution prohibits the State from discriminating directly

or indirectly against any person on grounds of age insisting that a reading of Article 27(4) of the Constitution against the above cited provision would reveal obvious discrimination on the basis of age that the 2nd Respondent does not even justify as envisaged under Article 24 of the Constitution.

67. The petitioner contended that the Respondent has not provided any statistics, law or regulations to prop its claim that the object is intended to ensure youth also get an opportunity to work stating that there was no evidence to show that for every retiring person, the position is strictly occupied by a youth. It was further argued for the Petitioner that the retirements ages that are applied for certain categories like lecturers and researchers as indicated in Regulation 70(1) (c) of the Public Service Regulations, 2020; the President under Article 137 of the Constitution or the Judges who retire at seventy years under Article 167(1) of the Constitution are different thus the argument that the retirement age is pegged on productivity is indefensible. The Petitioner equally pointed out that Members of National Assembly and the Senate have no prescribed retirement age.

68. Countering the position taken by the Petitioner, the 2nd Respondent argued that the Petitioner had merely alleged discrimination but not demonstrated its existence in comparison on the categories of people involved. Further,

that matter in question was an issue under the contract of employment which is made manifest at the time of employment hence is not a constitutional matter. The 3rd Respondent on the other hand argued this is a matter governed by policy and is determined by range of factors which include micro and macro economic dynamics, sectoral needs, considerations for individual with special and rare skills and knowledge among many factors.

69. I will first deal with the question of discrimination. It is important to first understand what discrimination entails.
70. In **Peter K. Waweru -Vs-Republic (2006) eKLR** the Court referring to Black's Law Dictionary explained:

"Black's Law Dictionary 11th Edition defines "discrimination" as under:

"Discrimination" in constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

71. Further, ***in Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR*** the Court stated:

“Discrimination... will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.”

72. In the instant case, the Petitioner did not demonstrate that there was arbitrary differentiation of classes of persons covered under Section 79 (1) and 80 of the Public Service Commission Act as read with Section 70 (1) in regard to the application of the mandatory retirement age. Indeed, though reference was made to the different retirement age of the President and the Judges, no attempt was made to demonstrate that these categories of employees are in that category or class as those whose mandatory age is 60 years. In any, it is necessary to underscore that different principles relating to the nature of employment apply and this could impact on the retirement age. The Petitioner in alleging discrimination in respect of persons targeted under the mandatory retirement age of 60 and 65 under regulation 70 did not bother to demonstrate that the lecturers and researchers, Members of Parliament, Judges and the President are in similar category as the employees whose mandatory age is set under regulation 70 of Public Service Commission Regulations, 2020 and thus are being

unreasonably favoured by giving them different retirement ages. It should be underscored that equality does not directly translate into homogenous treatment, such as that the same retirement age fits all because different categories of employees are governed by different principles and job demands and as long as the differentiation is reasonable, there would be no discrimination. Consequently, unless it could be demonstrated that there is no rational basis for the application of the different age thresholds, the burden of which lies on the one who alleges, this Court would have no basis for declaring the regulation unconstitutional as every law is presumed constitutional until the contrary is proved. The responsibility to demonstrate the unconstitutionality thus fell on the Petitioner. He did not discharge that burden. It is thus apparent that the Petitioner merely challenged the mandatory retirement age under regulation 70 of the PSC regulations, 2020 only because he disagrees with it without any iota of evidence on its discriminative application.

73. I need to emphasise that under Article 234 (2) (g) of the Constitution as read with Section 92 (1) & 2 of the Public Service Commission Act gives the mandate to set the conditions of service to to the 2nd Respondent. Indeed, Section 92 (2) (f) of the PSC Act specifically gives the 2nd Respondent to give guidelines on the retirement ages.

74. In **Alliance v President of South Africa and Others (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC)** the Court cautioned against the rush to invalidate laws on rationality grounds except in the clearest of cases. It stated:

“Rationality and the separation of powers....

“The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society.”

This applies equally to executive decisions.

75. Retirement age is a service condition which the 2nd Respondent is empowered under Article 234 (2) (g) as read with Section 92 (2) (f) of the Public Service Commission Act to determine alongside many other conditions, it is not a fundamental right. This Petition is thus a vain attempt to elevate a service condition to a fundamental right by asking the Court to upstage and interfere with the mandate of the employer to set service conditions and leave it to discretion of the employee to determine their retirement age. That is not possible, that is a policy matter that vests with the employer and as long as the policies made are reasonable

and do not violate the human rights, the business of setting service conditions, including setting the retirement age remains with the employer who as submitted by the 3rd Respondent is guided by a range of factors such as fiscal dynamics, sectoral needs, special and/or rare skills, workforce planning and so forth.

76. The Petitioner in urging this Court to find that there is discriminatory application relied on a passage in the case of **Mboya v Attorney General; National Employment Authority (Interested Party) (Petition E335 of 2023) [2024] KEHC 2240 (KLR)** where this Court held thus:

“Discrimination on grounds of age is explicitly proscribed by the Constitution. In addition, the National Employment Authority Act lists one of its objectives under Section 3 (e) as being to “facilitate and promote equity and diversity, and eliminate discrimination in the employment of Kenyans.” It is therefore a paradox that the same Act goes ahead to make a daring move of dividing Kenyans in the working age population along the line of age by isolating a certain age category for grant of an employment opportunity while excluding the other from that opportunity in flagrant violation of an express Constitutional provision. Affirmative action is not an excuse for violating an undoubted constitutional principle however well-meaning it might be. I find that Section 17 (2) (d) of the National Employment Authority Act No. 3 of 2016 contravenes the principle of providing equal access of opportunities to Kenyans in the working age population. It is discriminatory, unconscionable, null and void.”

77. The above case is however distinguishable from the instant one. The present case deals with a service condition relating to a person who already has been in employment and is required to exit pursuant to the terms and conditions of service of that employment. In the previous case, the legal provision in question had disallowed a category of people, that is persons above 35 the age of years from seeking employment with the government employment agency. Consequently, while one is a service condition for persons who have been working, this one did not even create an opportunity for them to seek that employment in the first place and all because of age.
78. Secondly, the contention that the mandatory retirement age under regulation 70 (1) & (2) of the Public Service Regulations, 2020 discriminates because it renders people in that age category jobless and/ unemployable is not entirely considering that both the Statute and the Regulations have made provisions for instances when such persons may be retained despite reaching the retirement age on contractual terms in appropriate cases.

Section 80 (2) provides:

“Despite subsection (1)(b), the Commission or other appointing authority may engage the public officer for service after the retirement upon such terms of contract as may be agreed if —

- (a) *the public officer possesses rare knowledge, skills and competencies for the time being required in the service;*
- (b) *the retired officer is willing to be engaged on contract; and*
- (c) *the retired public officer's performance shall not in any way be impaired by age.*

79. Having regard to the foregoing, this Court finds that this Petition lacks merit.

80. The inescapable conclusion is that it is hereby dismissed with not orders as to costs being a public interest litigation.

Dated, signed and delivered virtually at Nairobi this 13th day of August, 2025.

.....
L N MUGAMBI
JUDGE