



**Macharia v Safaricom PLC (Petition 434 of 2019) [2021] KEHC 462 (KLR)
(Constitutional and Human Rights) (8 July 2021) (Judgment)**

Wilson Macharia v Safaricom Plc [2021] eKLR

Neutral citation: [2021] KEHC 462 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 434 OF 2019
JA MAKAU, J
JULY 8, 2021
IN THE MATTER OF ARTICLES 10, 22, 23, 27(4), 28, 29 AND 54(1) OF
THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF SECTIONS 12(1), (2) AND 15(1), (2) OF THE
PERSONS WITH DISABILITIES ACT
AND
IN THE MATTER OF ARTICLES 1 AND 27(1)(A) OF THE CONVENTION
ON THE RIGHTS OF PERSONS WITH DISABILITIES
AND
IN THE MATTER OF SECTION 5 OF THE EMPLOYMENT ACT
BETWEEN

BETWEEN
WILSON MACHARIA PETITIONER
AND
SAFARICOM PLC RESPONDENT

The rights to human dignity and fair administrative action of an employment candidate were violated by an employer who invited him for interview without having the software necessary to evaluate and enable the candidate to work.

Reported by Beryl Ikamari



Labour Law - employment - recruitment - recruitment of persons with disability - reasonable accommodation for persons with disability - where an employer was unable to fully evaluate a candidate with visual impairment due to a failure to acquire the necessary software - whether a candidate who was invited for an interview by an employer who knew that it lacked the means to fully evaluate the employee was treated fairly - Constitution of Kenya 2010, article 47; Convention on the Rights of Persons with Disability, article 2; Persons with Disability Act, No 14 of 2003, section 12.

Constitutional Law - fundamental rights and freedom - right to dignity, right to fair administrative action and right to equality and freedom from discrimination - differential treatment - where an employer lacked the software to evaluate and enable a visually impaired candidate to undertake his duties but nonetheless invited the candidate and allowed him to undergo the full recruitment process but later withdrew a letter of offer of employment on grounds that it was issued erroneously - where a visually impaired employment candidate failed to show that he had been treated differently from other visually impaired candidates - whether the employment candidate was discriminated or had his rights to fair administrative action and dignity violated - Constitution of Kenya, 2010, articles 47, 27 and 28.

Brief facts

The petitioner alleged that the respondent denied him an employment opportunity on the basis of having a disability. He further stated that the respondent's actions occasioned breaches of his rights to equality and freedom from discrimination and his rights to dignity. He also alleged that the respondent had breached sections 12(1), 12(2), 15(1) and 15(2) of the Persons with Disabilities Act as well as article 1 and 27(1)(a) of the Convention on the Rights of Persons with Disabilities.

The respondent explained that the petitioner and other persons with disabilities were amongst the candidates shortlisted for an employment opportunity. The petitioner was unable to take the SHL Computerized aptitude test as he was visually impaired and he was asked to proceed to the oral phase of the interview as the respondent arranged for a workaround for the aptitude test.

Despite not having undertaken the technical part of the interview, the petitioner was invited to undergo a medical test. There were no special facilities or modifications that could enable the petitioner to undergo the technical part of the interview. Upon making inquiries, the petitioner was informed that the medical test was for readiness for when the respondent would have adequate software to enable the petitioner to take the technical test. On September 7, 2017, the petitioner received a letter to join the respondent as a Trainee Customer Experience Executive. He was to undergo an eight-week induction and training session starting on September 11, 2017 in Eldoret. Thereafter, the respondent argued that the offer made to the petitioner was an inadvertent error. Among the reasons why it was an error was that the petitioner had not sat and passed the technical and oral interview and he could not expect an appointment without having done so.

The respondent explained that despite the fact that it had employed its best efforts, it had not been able to integrate its customer service platform with the requisite software to enable the petitioner to work as a Customer Experience Executive.

Issues

- i. Whether it was possible for a visually impaired person to be employed where an employer failed to acquire the software that would enable that person to work.
- ii. Whether an employment candidate who was invited for an interview by an employer, who could not fully evaluate him due to lack of software and later withdrew a letter of offer of employment on grounds that it had been issued erroneously, had been discriminated and had his rights to dignity and fair administrative action violated.

Held

1. Diligent efforts had been made to have system integration software that could allow visually impaired persons to work as Customer Experience Executives. Unfortunately, the respondent explained that such software integration was not possible due to conflicting software configurations that could arise.



- Therefore, the respondent's failure to provide reasonable accommodation to the petitioner was a failure to provide an opportunity to the petitioner on account of lack of software but not on account of his visual disability and as such there was no infringement of the petitioner's rights to equality.
2. The respondent failed to demonstrate that it was impossible to employ the petitioner because he was visually impaired. Sight was not necessary for purposes of operating and working while using a computer in modern society.
 3. The petitioner could not meet the technical specifications of the position offered as he was visually impaired and could not thus sit through the technical evaluation. In addition, to employing the petitioner, the respondent would have had to make adjustments and technological incorporations to its entire system, which was not viable in the short run due to budgetary constraints. That information was made known to the petitioner on the day of the interview.
 4. The respondent had allowed the petitioner to undertake all internal steps knowing he was visually challenged. The respondent's excuse was afterthought that was introduced late to the detriment of the petitioner. The respondent knew right from the beginning that the petitioner's work called for software, yet they took him through all recruitment steps. He was invited amongst the successful candidates only to be rejected on reporting. That subjected the petitioner to ridicule and humiliation amongst other candidates hence lowering off his dignity. The failure to provide the alleged software at the time of recruitment interview violated the petitioners right to fair administrative action as provided under article 47 of the Constitution.
 5. The respondent did not tender any evidence on the cost of accommodating the petitioner or at all what would be the cost. The respondents had full knowledge of what entailed the integration of the digital system and as such the respondent should not have ensured that the recruitment process would be able to encompass all, if it was unable to do so.
 6. The respondent was in the process of processing the software and that was a demonstration that by processing the software that would not occasion it any undue hardship. The larger the operation, the more likely to afford to permit a under range of accommodation for employees with disability. What amounted to a prohibitively expensive or disruptive accommodation for small workforce may be found to be entirely affordable or double for a larger one. Costs could amount to an undue hardship if it could be established to be, related to the accommodation, probable and not based on surmise or speculation and so substantial that it would either charge the essential nature of the operation or substantially impact, up its financial viability. Accommodating the petitioner and others with visual impairment had not been shown to have negligible impact on the budgetary allocation to the respondent.
 7. The respondent had failed to meet statutory obligation under section 12 of the Persons with Disability Act to ensure that there was reasonable accommodation of the persons with visual disability like the petitioner. The respondent was accommodative of the petitioner who was allowed to go through all stages of recruitment process except for technical evaluation that required the special software which respondent had not acquired.
 8. The respondent after the interview hired persons with disability, however, such persons were not visually impaired and, whose identities had not been disclosed so as to protect their right of privacy. The petitioner had not demonstrated that the recruitment process was not free from discrimination, nor had he shown how he was discriminated and that any of the persons with disability was visually impaired and was favoured while he was discriminated. He had not shown that he was given differential treatment to that given to other candidates on the basis of his disability.
 9. There was no evidence produced to demonstrate that the respondent discriminated against the petitioner simply because the respondent could not accommodate the petitioner in the company. Under section 15(2) of the Persons with Disabilities Act, an employer was to be deemed not to have discriminated against a person with disability if special facilities or modification, whether physical,



- administrative or otherwise, were required at the workplace to accommodate the person with a disability, which the employer could not reasonably be expected to provide.
10. The respondent had demonstrated that special facilities or modification were necessary at the work place to accommodate the petitioner as person with visual disability, being a special software and to employ the petitioner, respondent would have had to make adjustments and technological incorporations to its entire system which was not viable in that short run due to budgeting constraints. The respondent could not be reasonably be expected to provide software due to budgetary constraints. The respondent could not be deemed to have discriminated against the petitioner. The petitioner was not discriminated against.
 11. The respondent was in breach of fair administrative action as it failed to act expeditious, efficiently, lawfully, reasonably and procedurally fairly from the time they invited petitioner for interview, during the recruitment process and in informing and in inviting the petitioner to sign contract, only to later, inform him the letter of invitation was erroneously made to him. The petitioner's right to fair administration action, having been adversely affected by administrative action, the petitioner had the right to be given written reasons for the actions. The petitioner must have suffered great humiliation from fellow candidates, family members and friends. The respondent failed to respect the petitioner's right to human dignity, equity, equality and dignity. The petitioner suffered physically and psychologically.
 12. The petitioner had demonstrated that his right to be treated with dignity as provided under article 28 and 54(1) of the Constitution had been violated and remained violated by the respondent. The petitioner was entitled to compensation, under article 23; compensation of Kshs 6,000,000/= reasonable.

Petition partly allowed.

Orders

- i. *Declaration issued that the act of denying the petitioner an employment opportunity on the basis of this disability was not shown to amount to an act of discrimination against the petitioner nor was it discriminatory by virtue of section 15(2) of the Person with Disabilities Act.*
- ii. *Declaration issued that the petitioner's right to be treated with dignity as provided for under article 28, 41 and 54(1) and Fair administrative Action under article 47 were violated by the respondent.*
- iii. *The petitioner was awarded compensation under article 23(3)(d) of the Constitution for violation of rights to be treated with dignity under article 28 and 54(1) and for violation of rights to fair Administrative Action under article 47 the sum of Kshs 6,000,000/=.*
- iv. *Costs to the petitioner with interest from the date of judgment.*

Citations

Cases

Kenya

Judicial Service Commission v Mbalu Mutava & another Civil Appeal No 52 of 2014; [2015] eKLR - (Applied)

United States

Cuiellette v City of Los Angeles B203820 (Cal Ct App Apr 7, 2009) - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 1, 10, 23(3)(d); 27(4); 28; 41; 47; 54(1) - (Interpreted)
2. Employment Act, 2007 (Act No 11 of 2007) sections 3(a)(b); 5(2); 8(c) - (Interpreted)
3. Fair Administrative Actions Act, 2015 (Act No 4 of 2015) section 2 - (Interpreted)
4. Persons with Disabilities, 2003 (Act No 14 of 2003) sections 12(1)(2); 15(1)(2) - (Interpreted)



Instruments

Convention on the Rights of Persons with Disabilities (CRPD), 2006 articles 1, 2, 5(3); 27(1)(a)

JUDGMENT

1. The petitioner through an amended petition, amended on May 13, 2020 with leave of this court and dated October 30, 2019 seek the following reliefs:-
 - a) A declaration that the act of denying the petitioner an employment opportunity on the basis of his disability amounted to an act of discrimination against the petitioner and that it offends articles 10, 27(4), 28, 41 and 47 of the Constitution of Kenya 2010 and section 5(2), 3(a & b) and 8(c) of the Employment Act.
 - b) A declaration that the petitioner's right to be treated with dignity as provided for under articles 28 and 54(1) of the Constitution of Kenya 2010 has been and remains violated by the respondent.
 - c) A declaration that the respondent has violated and continues to violate sections 12(1), (2) and 15(1), (2) of The Persons with Disabilities Act as well as article 1 and 27(1)(a) of the Convention on the Rights of Persons with Disabilities.
 - d) Compensation
 - e) Exemplary and aggravated damages
 - f) Costs of the suit and interests thereon until payment in full
 - g) Any further relief that this honourable court may deem fit to grant.

Respondent's Response

2. The respondent is opposed to the petition and in doing so filed a replying affidavit sworn by Odhiambo Ooko on 8th July 2020 and supplementary affidavit sworn on 8th August 2020.

Background

3. In or about August 2016, the respondent advertised for a customer Experience Executive position through its career portal and a newspaper advert; which clearly indicated that the respondent is committed to creating a "diverse environment and is proud to be an equal opportunity employer. All qualified Kenyan applicants will receive consideration for employment without regard to race, colour, religion, gender, tribal origin, disability or age." Respondent was as per the advertisement committed to employing all qualified candidates right from the beginning including Persons with Disabilities (PWDs).
4. The shortlisted candidates included the petitioner and other PWD candidates were invited for a two-stage interview process on 7th July, 2017. Contrary to the petitioner's assertions at paragraph 8 of the submissions that the respondent indicated that the petitioner was successful, the Petitioner was shortlisted with other candidates and this by itself did not amount to success in the recruitment.
5. The PWD candidates were expected to go through the same process as all the other candidates; this would include a SHL Computerized Aptitude test and an oral interview. However, the petitioner



and other PWD's aptitude tests would have the following reasonable accommodations (appropriate modifications and adjustments).

- i. PWDs would be graded to allow for a lower pass mark.
 - ii. PWDs would overall be allowed more time duration to complete the aptitude tests.
6. The above-mentioned modifications to the interview test criteria were in accordance with the *Convention on the Rights of Persons with Disabilities*, the *Persons with Disabilities Act* as well as the *Constitution of Kenya*. The same was designed to afford the PWDs reasonable accommodation so that they are not unduly disadvantaged by the interview process.
 7. On the date of interview, all interviewees in attendance were taken through an orientation programme before the actual interview. The petitioner and other applicants were informed that the interview would be two-fold; consisting of both oral and technical evaluations.
 8. The respondent's Senior Manager Employee and Labour Relations, Mr Ooko was informed that one candidate being the petitioner herein, was not able to undertake the SHL Computerized Aptitude test as he was visually impaired. Mr Ooko met the Petitioner and confirmed the same. He then told the petitioner that they were not able to conduct the SHL interview but asked him to proceed to the oral interview phase as the respondent considered a workaround for a later date. The alternative would have been to simply inform him he could not go ahead with the interview but they did not. The parties urged that this amounted to reasonable accommodation as provided for in the law.
 9. The reason given to the petitioner that the respondent would consider a workaround is that the respondent had at that point commenced a project which was then at the initial stage that would have the respondent employ 10 visually impaired Customer Experience Executives. The respondent had engaged software providers who were working with the respondent's internal technical team to review integrations with the existing systems to support the project. This demonstrates the respondent's willingness to promote opportunities for PWDs. That since the virtually impaired Customer Experience Executives would later conduct a similar interview process as the one undertaken with respect to the recruitment in question, Mr Ooko asked the Petitioner to go through the other parts of the interview save those that needed the special software such as the technical interview. It was on the basis of this understanding that the petitioner went through the oral interview and medical test as noted above. This would provide an opportunity to have the petitioner interviewed in consideration for the same position when the time came.
 10. The petitioner together with other candidates were thereafter invited for a medical test at Valley ENT-Afya Center along Tom Mboya Street, Nairobi as part of the second stage of the interview. The medical fitness to role test was conducted on July 12, 2017. The invitation email dated July 11, 2017 (which was a standard email sent to all candidates) read as follows:

Dear Candidate

Following your technical & oral interview, you will proceeding to our background check stage. You will soon be contacted with a list of documents that you are required to scan and email to facilitate this process. Please submit them exactly as requested and within the time given

You will also be proceeding to our company medical test. The details are given below...

(See annexure WM-4 to the affidavit of Wilson Macharia sworn on October 30, 2019).
 11. It is contended that the petitioner knew very well at this point that he had not undertaken the technical interview. There were no special facilities or modifications at that time that would enable him to



undergo the technical part of the interview. It was mutually agreed that he would undertake that test later when the facilities for doing so were available, as the respondent was working on a project to enable this as aforesaid. The respondent's aforesaid invitation communication of July 11, 2017 was erroneous in part to the extent that it indicated that the petitioner had undertaken the technical interview. The respondent took steps to confirm that this was an inadvertent error, and that it was understood to be so, the petitioner wrote an email in reply to the invitation. The email dated July 11, 2017 stated as follows:

Greetings,

I hope this finds you well.

1st of all, this is to inform receipt of your email. Secondly, for clarification purposes;

Am I also shortlisted to go for the medical report? I did not undertake the technical assessment as I am legally blind. Please advice.

Regards,

Wilson Macharia

(See annexure WM-5 to the affidavit of Wilson Macharia sworn on October 30, 2019).

12. The petitioner additionally sent a text message to the respondent's Representative who was handling the recruitment exercise. The text message was sent out on July 11, 2017 at 1558 hours. The text message read as follows:

“Good afternoon sir. Regarding your email this morning, am I also supposed to go for the medical assessment as scheduled? Your attention is drawn to the fact that I did not seat for the technical test as I am blind. Please advice.”

(See annexure WM-8 to the affidavit of Wilson Macharia sworn on October 30, 2019).

The respondent's representative replied on the same day at 1704 hours as follows:

“Hi, this is in readiness for when we will have adequate software to allow you do the test later.” (See annexure WM-8 to the affidavit of Wilson Macharia sworn on 30th October, 2019)

The petitioner replied to this clarification as follows:

“Duly noted. Thanks for the timely response.”(See annexure WM-8 to the affidavit of Wilson Macharia sworn on October 30, 2019)Further to the above, the Petitioner sent to the Respondent documents including his updated curriculum vitae, a scanned copy of a certificate of good conduct from the Directorate of Criminal Investigations, a scanned copy of a certificate from the credit reference bureau, a copy of a University certificate and a copy of the Petitioner's national ID. The petitioner was also required to send a copy of an executed consent form.

13. It is stated by the respondent that due to an oversight, attributable to the fact that the petitioner had undertaken most of the on boarding procedures for appointment as a Customer Experience Executive, on September 7, 2017 or thereabout, the petitioner received an offer to join the respondent as a Trainee Customer Experience Executive. The petitioner, together with the other successful candidates, were invited to attend the respondent's offices to sign the offer. There would be an 8-week induction and training starting from September 11, 2017 in Eldoret.



14. The respondent argue that the offer made to the petitioner on September 7, 2017 was unfortunately due to an inadvertent error as explained above. The respondent understood or ought to have understood the offer as an error for the following reasons:
- i. It was acknowledged by the petitioner that to be appointed for the position, a candidate had to sit for and pass the oral and technical interviews
 - ii. It is acknowledged by the petitioner that he did not sit the technical interview
 - iii. The petitioner was informed and acknowledged that even though he was undertaking the other interview formalities like medical checks, he would still be required to undertake the technical interview when the facilities for origin so were available.
 - iv. It was not reasonable for the petitioner to expect that he would be appointed to the position without having first undertaken and passed the technical interview.
 - v. In any event, the petitioner understood and acknowledged that any offer for appointment was contingent upon the respondent first acquiring software and integrate it with the current customer service platform to enable the petitioner to be able to offer services as a Customer Experience Executive.
15. It is further stated that the respondent, despite best and diligent endeavors, was not able to integrate its customer service platform with the requisite software to enable the petitioner to work as a customer Experience Executive. It is averred that the respondent through the same recruitment process was able to offer employment to 11 other PWDs whose disability did not affect their ability to work with the current customer service platform. This is confirmed at paragraph 11 of the replying affidavit which cannot be controverted.
16. In view of the circumstances it is petitioner's position that the respondent has breached its rights and seeks declarations to the effect that the respondent has denied him employment based on his disability which act he alleges is discriminatory; that his right to be treated with dignity has been violated; and that the respondent has violated the *Persons with Disabilities Act* as well as the Convention on the Rights of Persons with Disabilities. The petitioner claims compensation. All these claims are denied and stated that the petitioner is not entitled to the prayers sought.

Analysis and Determination

17. I have carefully considered the petitioner's pleadings as well as the respondent's pleadings, rival submissions and from the same the following issues arise for determination:-
- a) Whether it was possible for the respondent to employ the petitioner.
 - b) Whether in the circumstances, the respondent's conduct on the entire recruitment process amounted to discrimination against the petitioner.
 - c) Whether in the circumstances, the orders and compensation sought should issue.

Whether it was Possible for the Respondent to Employ the Petitioner.

18. The respondent case is that by September 7, 2017 when the offer was made to the petitioner, the respondent had not yet been able to procure the necessary software and has not done so to date. It is respondent's contention, that it has made diligent efforts to have the system integrated to allow the software, that enables visually impaired persons to work as Customer Experience Executive. It is urged by the respondent, that the integration is therefore not possible due to conflicting



software configuration; and as such it has not been possible for the petitioner to undertake the technical interview, urging that the adjustments needed to be made by the petition have technological advancements, that required to be integrated with the company's entire system. The same was found not to be economically viable by the company in the sort run as there were no budgetary provisions for doing so.

19. It is further concluded by the respondent, that though the petitioner volunteered to bring his own computer, it was neither practical nor safe regarding company data and operations to allow the petitioner to bring his own equipment and integrate them to the respondent's system. This is due to the privacy of communications, sensitivity of M-PESA data and the data protection laws.
20. The duty and obligation to procure the necessary software lie with the respondent and it is not even without clear demonstration for the respondent to urge that it made diligent efforts to have system integration to allow the software that could enable visually impaired persons to work as Customer Experience Executive. I do find reasonableness with the respondent's contention, that the integration is not possible due to conflicting software configurations if there is willingness to comply to engage the visually impaired persons to work as customer experience executive. The respondents have even in the replying affidavit under paragraphs 6 – 10 by Odhiambo Ooko demonstrated that it is aware that it owed persons such as the petitioner herein, the duty to promote equality and provide reasonable accommodation, which it should have provided in this case for the petitioner. I find the respondent's failure to provide reasonable accommodation to the petitioner, is a failure to afford an opportunity to the petitioner on account of lack of software but not on account of his visual disability and such there was no infringement on his rights to equality.
21. All in all, I find that the respondent has failed to demonstrate that it was impossible for respondent to employ the petitioner based on his visual disability, as one needs not have sight to use, operate and work using a computer in the modern society.

Whether in the Circumstances, the Respondent's Conduct on the Entire Recruitment Process Amounted To Discrimination Against the Petitioner.

22. The petitioner contended that the respondent admitted that the petitioner was successful applicant referring to the affidavit of Mr Ooko. It is further contended the respondent has not explained why it did not accommodate the petitioner; notwithstanding it owed the Petitioner the duty of reasonable accommodation, which petitioner urged was breached through discrimination.
23. According to the petitioner, under article 2 of the convention on rights of persons with disability – CRPD, "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities the enjoy or exercise on an equal basis with others on all human rights and fundamental freedoms.
24. It is further stated that the article defines "Discrimination on the basis of disability" as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.
25. Further to the above article 5(3) of the CRPD provides that in order to promote equality and eliminate discrimination, States parties shall take all appropriate steps to ensure that reasonable accommodation is provided.



26. In addition to the above according to article 27 of the *Convention on the Rights of Persons with Disabilities*; it is stated;
1. States parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
 - a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
 - i. Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;” (Emphasis added)
27. The petitioner referred to paragraph 6 – 10 of the respondent’s replying affidavit of Odhiambo Ooko and urged, that it is evident the respondent knew that it owed the petitioner the duty to promote equality and provide reasonable accommodation. It is urged that its failure to accommodate the petitioner and provide reasonable accommodation and instead denying him the well-desired opportunity on account of his visual disability amounts to discrimination and infringes on his right to equality.
28. It is further contended by the petitioner, under paragraph 10 of the respondents affidavit, it had prepared and subjected the petitioner to a very detailed and well calculated process, that called for a well thought out and well planned structure, that would have helped eradicate discrimination, so as to fit within a fair administrative action threshold. However the respondent it is assorted, went right ahead and breached the said structure.
29. It is urged the respondent had indicated that it had anti-discrimination policy, however none was produced. It is averred failure to produce any leads to inevitable conclusion or presumption, that none existed. It is further urged had the respondent any, that would have helped it uphold the duty to protect and promote the right to dignity it owed to the petitioner.
30. On the software, the respondent at paragraph 17 of the replaying affidavit alleged that it refused to engage the petitioner because it did not have the software, that the petitioner needed for the work. It is further stated by the petitioner, that he had demonstrated he would be able to take up any position through his oral interview and medical tests without any challenge. In support thereof, he submitted documents digitally as admitted in the respondent’s replying affidavit at paragraph 14 by Mr Odhiambo Ooko.
31. The petitioner further contended, that the respondent must have calculated and prepared itself for the job description before placing the advertisement inviting the members of public to apply for the job, and in which the Respondent had set out all the requirements, that the petitioner met. The petitioner urged that the issue of software was raised at the 11th hour as an afterthought, so as to limit the petitioner’s right to equal benefit and protection before the law in his status as a person with visual disability.
32. It is urged further, that the respondent allegation that it was in the initiation process of installing and integrating a computerized interview system, was discrimination as against the petitioner, as the



- petitioner was denied equal opportunity as the other candidates. It is urged the respondent structure should have set up and/or installed a system for reasonable accommodation for the petitioner's visual impairment.
33. The respondent response on issue whether its conduct of the entire recruitment process amounted to discrimination against the petitioner urged, that the advertisement of August 2016 for the position of Customer Experience Executive indicated that the respondent is committed to creating a "diverse environment and is proud to be an equal opportunity employer. All qualified Kenyan applicants will receive consideration for employment without regard to race, colour, religion, gender, tribal origin, disability or age." It is therefore averred that the respondent committed to ensuring that the entire recruitment process was fair and considerate of all applicants despite their race, gender, disability or any other form of discrimination that there may be.
34. It is submitted by the respondent that at paragraph 13 of the petitioner's supporting affidavit has noted that he was duly informed by the respondent, that it was in the process of acquiring the requisite software and that the supply of the software had taken some time. Therefore in respondent's case, that does not amount to violation but an indication of the willingness of the respondent to put in/adopt reasonable adjustment measures.
35. The respondent further urged, that nothing in the petitioner's petition, supplementary affidavit or submissions demonstrate, that the Petitioner was occasioned any form of discrimination regarding the conduct of the entire recruitment process up until the erroneous issuance of a letter of appointment. As far as the respondent is concerned. It is urged by the respondent as follows:-
- a. The respondent was and still remains committed to employing all qualified candidates irrespective of their age, gender, race or disability provided that the company infrastructure is sufficient to enable such person to perform their duties and obligations in the company.
 - b. All the candidates who were shortlisted including the petitioner and other PWDs were invited for the two-stage interview. In the two tests, PWDs were given fair treatment as their aptitude tests would be granted to allow for a lower pass mark and they would overall have a longer duration to complete the test.
 - c. Whereas the respondent's officer immediately recognized that they did not have the relevant infrastructure to enable the petitioner to perform his duties and obligations, they did not send him away on those grounds.
 - d. The petitioner was instead allowed to go through the oral interview and medical test to provide the opportunity to have the petitioner interviewed in consideration for the visually impaired Customer Experience Executives position when the time came. This information was given to the petitioner before the commencement of the petitioner's oral interview.
 - e. It was of the understanding at (d) above that the petitioner went through the oral interview and the medical test.
36. The respondent in addition to the above urged that at all material times, the respondent was accommodative of the petitioner. The petitioner was allowed to go through all stages of the recruitment process save for the technical evaluation, that required the special software.
37. The respondent urged that in any case, the respondent eventually hired 11 persons with disabilities, only that such persons were not visually impaired. The respondent contended that it is not able to disclose the identity of such persons to protect their privacy. The respondent therefore contended that it has demonstrated that the recruitment process was free from discrimination, and that it cannot



therefore be concluded that the respondent was discriminative of the petitioner simply because the respondent could not accommodate the petitioner in the company.

38. The respondent in denying discrimination in the instant case relies on section 15(2) of the *Persons with Disabilities Act* which provides as follows:-

- “(2) Notwithstanding subsection (1), an employer shall be deemed not to have discriminated against a person with a disability if-
- (b) the disability in question was a relevant consideration in relation to the particular requirements of the type of employment concerned; or
 - (c) Special facilities or modifications, whether physical, administrative or otherwise, are required at the workplace to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.” (Emphasis mine)

39. In the instant petition and as argued and agreed by both parties, it is not in dispute that the petitioner could not meet the technical specifications of the position offered as he was visually impaired and could not thus sit through the technical evaluation. In addition, to employing the petitioner, the respondent would have had to make adjustments and technological incorporations to its entire system, which as submitted by respondent was not viable in the short run due to budgetary constraints. This information was made known to the petitioner on the day of the interview.

40. It is further urged by the respondent that the impediment relating to software had not been raised on the 11th hour as submitted by the petitioner. He was made aware of this right from the start. There was clear communication to this effect. It is for this reason that he was not able to undertake the technical interview.

41. The petitioner urged the respondent presented itself as an “Equal opportunity employer” on its jobs advertisement, yet it could not treat petitioner as equal before with other candidates on account of his visual discharge. The petitioner further questions why the respondent subjected him to intense and invasive recruitment process, if it had not made arrangement to provide reasonable accommodation and further why was petitioner told he was successful and invited for the open day, if the respondent was not ready to accommodate him due to his visual disability.

42. It is petitioner’s case that the respondent informed him during the recruitment process the letter informing him that he was successful was an error and proceeded to discharge him. It is contended by Petitioner that the respondent should have offered him an alternative engagement in the circumstances instead of discharging him. The petitioner could have been assigned to none routine duties in the intervening period as the petitioner is:-

- a) The petitioner is trained in using ICT, and was already used to working in his condition before.
- b) The petitioner had demonstrated that he could use technology during the nonvisual test, and that he had access and ability to use a computer system to share his CV and other required documents when required to do so by the respondents.
- c) The petitioner was able to attend to the oral and medical section of the Interview without challenge as instructed and he had engaged respondent staff who had openly suggested alternative action plans.



43. This could have been possible to provide reasonable accommodation by absolving the petitioner since it informed him of his success during the interview stage periods. The respondent could have ensured there was an available alternative to cater for the interviewee with visual impairment.
44. Reliance in support of the proposition for alternative job is placed in the American Case of *Cuiellette v City of Los Angeles*, (--- Cal.Rptr.3d ---, Cal App 2 Dist, April 22, 2011), where the Court of Appeal held that even if Cuiellette could not perform the essential duties “of a police officer, he could perform the essential functions of a position into which he had been placed by the [Los Angeles Police Department (“LAPD”)] as a reasonable accommodation in accordance with then existing practice.
- The court further stated that in order to establish a claim for employment discrimination pursuant to FEHA, the employee must show that “he or she was able to do the job, with or without reasonable accommodation.” Cuiellette was required to show he could perform the essential duties of the desk position and he met his burden. The court found that City’s removal of Cuiellette from his desk position based on the 100 percent disability rating from the workers’ compensation proceedings isolated the accommodations provisions of FEHA. (FEHA is the equivalent of the Kenyan *PWD Act*).
45. In the instant petition, there is no dispute that the respondent had allowed the petitioner to undertake all internal steps knowing he was visually challenged. I find that the respondent excuse to be an afterthought that was introduced late to the detriment of the petitioner. The respondent knew right from the beginning that the petitioner’s work called for software, yet they took him through all recruitment steps. He was invited amongst the successful candidates only to be rejected on reporting. This I find subjected the petitioner to ridicule and humiliation amongst other candidates hence lowering off his dignity. The failure to provide the alleged software at the time of recruitment interview violated the petitioners right to fair administrative action as provided under article 47 of the *Constitution* as everyone has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
46. The petitioner contended the respondent would have suffered no undue hardship had it offered to accommodate the petitioner into the employment nor has it been demonstrated that financial costs would amount to undue hardship only if it would allow the essential nature to affect viability of the enterprise responsible for accommodation of the petitioner. I find that the respondent did not tender any evidence to guide this court as regards the cost of accommodating the petitioner or at all what would be the cost. It is further noted the respondents had full knowledge of what entailed the integration of the digital system and as such the respondent should not have ensured that the recruitment process would be able to encompass all, if it was unable to do so. It is admitted that the respondent is in the process of processing the software and that is a demonstration that by processing the software that will not occasion it any undue hardship. On the size of the operation, I find the larger the operation, the more likely to afford to permit a under range of accommodation for employees with disability. This therefore follows what may amount to a prohibitively expensive or disruptive accommodation for small workforce may be found to be entirely affordable or double for a larger one. Costs can in my view amount to an undue hardship if it can be established to be, related to the accommodation, probable and not based on surmise or speculation and so substantial that it would either charge the essential nature of the operation or substantially impact, up its financial viability. I find that accommodating the petitioner and others with visual impairment has not been shown to have negligible impact on the budgetary allocation to the respondent herein.
47. Considering the parties rival affidavits, it turns out that the respondent has raised and advanced an argument and demonstrating that the cost of retaining the petitioner would have occasioned or caused change to the essential nature of the operation of the respondent causing substantially impact upon its



financial viability. The respondent was categorical that in order to accommodate the petitioner it was required to have a spare software as he is visually impaired and could not sit the technical evaluation. The respondent further relied on section 15(2) of the *Persons with Disability Act* which deems an employer not to have discriminated against a person with a disability of special facility or medication, whether physical, administrative or otherwise are required at work place to accommodate the person with disability, which the employer cannot reasonably be expected to provide.

48. In view of the above I find that the respondent has failed to meet statutory obligation under section 12 of the *Persons with Disability Act* to ensure that there is reasonable accommodation of the persons with visual disability like the petitioner. The respondent was accommodative of the Petitioner who was allowed to go through all stages of recruitment process except for technical evaluation that required the special software which respondent has not acquired. It is not in dispute that the respondent after the interview hired “persons with disability”, however, it is noted that such persons were not visually impaired and, whose identities have not been disclosed so as to protect their right of privacy. The petitioner has however not demonstrated that the recruitment process was not free from discrimination, nor has he shown how he was discriminated and that any of the “persons with disability” was visually impaired and was favoured while he was discriminated. He has not shown that he was given differential treatment to that given to other candidates on the basis of his disability. I find that there is no evidence produced to demonstrate that the respondent discriminated against the petitioner simply because the respondent could not accommodate the petitioner in the company. It is clearly provided by statute under section 15(2) of the *Persons with Disabilities Act* that an employer shall be deemed not to have discriminated against a person with disability if special facilities or modification, whether physical, administrative or otherwise, are required at the workplace to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.
49. The respondent has demonstrated that special facilities or modification were necessary at the work place to accommodate the petitioner as person with visual disability, being a special software and to employ the petitioner, respondent would have had to make adjustments and technological incorporations to its entire system which respondent urged, was not viable in that short run due to budgeting constraints. I find therefore in view of statutory provisions and the demonstration by the respondent as regards requiring special facility to accommodate the petitioner, the respondent cannot therefore be reasonably be expected to provide software due to budgetary constraints. In the circumstance the respondent cannot be deemed to have discriminated against the petitioner. I find the petitioner was not discriminated against.
50. I now turn to consider whether the petitioner constitutional rights under article 10, 27, 28, 41, and 47 were violated by the respondent. The petitioner submitted that the respondent failed to respect the petitioner's right to human dignity, equality, social justice, inclusiveness, equality and protective of the marginalized. It is petitioner's case that article 27(5) on his right to equality and freedom from discrimination based on his disability, he was denied an opportunity that he had secured. He urged under article 28, on human dignity, his dignity was trifled. It is his case that he had secured job with the respondent's company as he had received official communication that he was successful.
51. The petitioner further argued that article 41 provides that every person has the right to fair labour practices.
52. Under article 47 on Fair Administrative Action, the petitioner contended to his right to administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair, was violated by the respondent. The article further provides if a right of fundamental freedom of a person had been or is likely to be adversely affected by administrative action, that person has the right to be given written reasons for the action.



53. The petitioner in support of the provisions of article 47 sought reliance in the case of Court of Appeal in *Judicial Service Commissions of Kenya v Mbalu Mutava & Another* [2015] eKLR, in which it was concluded that unlike the right to fair hearing under the common law, the right to fair administrative action is wide in scope, as it encompasses several duties: the duty to act expeditiously; duty to act fairly; duty to act lawfully; duty to act expeditiously; duty to act fairly; duty to act lawfully; duty to act reasonably; and in specified cases, duty to give written reasons for the decision.
54. Further under the *Fair Administrative Action Act*, No 4 of 2015, under section 2 it provides that:-
“administration” Includes
(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
55. The duty and/or requirement to act fairly squarely falls upon the respondent herein. The respondent invited the petitioner for interview well knowing that it lacked special facilities or modification which were required or necessary at the workplace to accommodate the petitioner with disability which it could not reasonably have been expected to provide, at all material time of the recruitment process. The respondent accommodated the petitioner, by allowing him to go through all stages of recruitment process, while the respondent, was well aware that for it to carry out evaluation on the petitioner it required the special software which it had not procured or could provide, yet it never disclosed that fact to the petitioner. It subsequently communicated to the petitioner informing him that he was successful and invited him to attend special training. The respondent averment is that it erroneously issued a letter to the petitioner but when it discharged him it did not comply with article 47.
56. The petitioner urged that he received an express communication from the respondent informing him that he was successful in the interview on 7th September 2017, also via a phone call which was followed by an email stating the same information and calling him to sign a contract.
57. The respondent contended that:-
“c. Whereas the respondent’s officer immediately recognized that they did not have the relevant infrastructure to enable the Petitioner to perform his duties any obligations, they did not sent him away on those grounds.
d. The petitioner was instead allowed to go through the oral interview and medical test to provide the opportunity to have the petitioner interviewed in consideration for the visually impaired Customer Experience Executives position when the time came. This information was given to the petitioner before the commencement of the petitioner’s oral interview.
58. In the circumstance herein and considering the respondent’s conduct, i find the respondent in breach of fair administrative action as it failed to act expeditious, efficiently, lawfully, reasonably and procedurally fairly from the time they invited petitioner for interview, during the recruitment process and in informing and in inviting the petitioner to sign contract, only to later, inform him the letter of invitation was erroneously made to him. The petitioner’s right to fair administration action, having been adversely affected by administrative action, the petitioner had the right to be given written reasons for the actions. This the respondent did not do so nor has it demonstrated having done so. I therefore find petitioner’s right to fair administration action that is expeditious, efficient, lawful, reasonable and procedurally fair, was violated by the respondent. No reason has todate been given to the petitioner for respondent’s action. The petitioner must, have suffered great humiliation from fellow candidates,



family members and friends. The respondent failed to respect the petitioner's right to human dignity, equity, equality and dignity. The petitioner must have suffered physically and psychologically.

59. In view of the aforesaid I find that the petitioner has demonstrated that his right to be treated with dignity as provided under article 28 and 54(1) has been violated and remains violated by the respondent and i find the petitioner is entitled to compensation, under article 23, which I find in view of nature of this matter compensation of Kshs 6,000,000/= reasonable.
60. The upshot is that I find in favour of the petitioner as follows:-
- a) A declaration be and is hereby issued that the act of denying the petitioner an employment opportunity on the basis of this disability was not shown to amount to an act of discrimination against the petitioner nor was it discriminatory by virtue of section 15(2) of the Person with Disabilities Act.
 - b) A declaration be and is hereby issued that the petitioner's right to be treated with dignity as provided for under article 28, 41 and 54(1) and Fair administrative Action under article 47 were violated by the respondent.
 - c) The petitioner is awarded compensation under article 23(3)(d) of the Constitution for violation of rights to be treated with dignity under article 28 and 54(1) and for violation of rights to fair Administrative Action under article 47 the sum of Kshs 6,000,000/=.
 - d) Costs to the petitioner with interest from the date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF JULY, 2021.

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J. A. MAKAU
JUDGE

