



**ANO v Stanbic Bank Kenya Limited (Cause E166 of 2023)  
[2025] KEELRC 2505 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2505 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E166 OF 2023  
HS WASILWA, J  
SEPTEMBER 22, 2025**

**BETWEEN**

**ANO ..... CLAIMANT**

**AND**

**STANBIC BANK KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this claim vide a Memorandum of Claim dated 27<sup>th</sup> February 2023 and prays for judgment against the Respondents for: -
  - a. A declaration that the Claimant's employment services with the Respondent were terminated wrongfully, maliciously and or unfairly;
  - b. A declaration that Claimant's right to Equality and freedom from discrimination, Right to Dignity and the Right to Privacy have been violated by the Respondent contrary to the provisions of Articles 27(1), (2), 86 (6), Article 28 Article 31(d) 86 Article 41(1) of the Constitution as read together with sections 5 of the Employment Act;
  - c. An order do issue that Respondent's actions were discriminatory against the Claimant and order the Respondent to pay the quantum for discrimination;
  - d. An order do issue that the Respondent pay the Claimant the sum of Kshs. 5,025,694;
  - e. An order to issue that the Respondent to pay the Claimant damages;
  - f. General Damages
  - g. Costs of the suit and Interest;
  - h. Any other relief that the Honourable Court shall deem fit to issue.



## Claimant's Case

2. The Claimant states that she was employed by the Respondent on 2<sup>nd</sup> March 2015 as Project Administrator in the System Upgrades Department on contract. After two months, she went for an interview and was promoted by management to be a Constructional Project Manager.
3. The Claimant states that on 18<sup>th</sup> July 2016, she was permanently employed as a teller at the Respondent's Chiromo Branch, once she was trained, she was deployed to the Personal and Business Banking Department. On 1<sup>st</sup> October 2019, she was moved to Kenyatta Avenue Branch as a teller, where she had been working until she was illegally dismissed on medical grounds by the Respondent.
4. The Claimant states that throughout her adult years, she has been suffering from endometriosis. This is a condition in which cells similar to the lining of the uterus, or endometrium, grow outside the uterus and also experiences severe pain during her menses. Despite suffering with this disease, she diligently performed her duties as a teller and in the roles frequently endowed on her by the Respondent. To add to this, her monthly input reports by the Respondent indicated on many different times that she was on track/setting an example/making progress.
5. The Claimant states that her health deteriorated in September 2019 leading to her undergoing surgery, which she unfortunately, she developed after surgery complications.
6. On 1<sup>st</sup> October 2019, the Claimant reported in for her first day as a teller in the new branch at Kenyatta Avenue. She attended refreshment training for her role for the next days, as was required and began her role.
7. Due to complications after the surgery, she was admitted to hospital on various dates of November and December 2019, which dates were documented by the Respondent
8. The Claimant states that on 14<sup>th</sup> June 2020, she contracted the Covid 19 virus while at work due to the nature of her work. The Respondent then categorized her as a vulnerable person and issued her a letter requiring her to work from home and a laptop to work with while at home, however, the Respondent failed to define the roles and responsibility she was to perform.
9. The Claimant states that she would diligently execute any back-office role assigned to her by the team leader of the asset support officer and the Customer service inquiry team at the Kenya avenue branch.
10. The Claimant states that she was eventually cleared of the Covid 19 virus on or about September 2020 and at that time the Bank developed a policy that allowed all staff to work from home, thus, she began working for home till 2021 and submitted her work on time and made a point of being available for work meetings which were held on zoom.
11. Despite working from home, the Claimant received recognition for her work that same year and no time did she ever receive a compliant from the Respondent concerning her work.
12. The Claimant states that her issues with the Respondent began in December 2021 when she received quarter pay of her salary instead of her full salary. Upon receiving the reduced amount, she immediately requested the Respondent to explain the reason they had made deductions from her salary without any notice.
13. In response, the Respondent became repulsive with no intention to resolving or explaining the legitimate reason why the salary had been deducted. Soon after, the Claimant received a letter from the Respondent notifying her that she would be receiving half pay beginning 1<sup>st</sup> December 2021 for



reasons that she had exhausted 56 days of her sick leave and that it had not delivered the said letter on time as she was hospitalized at time the letter was written.

14. The Claimant states that that during the month of December 2021 she was working from home and the Respondent had not made any complaints concerning her work or any other issue. Further, the Respondent had sent her work which she turned in without fail thus she would have easily received the letter if indeed the said letter was written on 1<sup>st</sup> December 2021.
15. It is the Claimant's case that Respondent became hostile towards her due to her following up on the illegal deductions and began to ask her to visit various doctors for medical evaluations/assessment to ascertain that she was fit to work, however, she complied with the Respondents demands and went to all the doctors. On 22<sup>nd</sup> December 2021, the Claimant verbally requested her line manager to resume her duties at work.
16. On 10<sup>th</sup> January 2022, she was called to a meeting by the Respondent to explain why her salary had been deducted. The Respondent explained that according to its CBA and pertaining sick leave, she was entitled to 56 days of sick leave which were fully paid, while another 56 days would be on half pay. Regardless, the Claimant indicated that before her illness she had served the Respondent diligently.
17. During the same meeting, one of the Respondent's representatives raised a claim that the Claimant was doing minimum work while at home, which came as a surprise since the Respondent was the one who sent out work to the Claimant and even awarded her recognition for her work in 2021 while working from home.
18. The Claimant states that due to her illness she was no longer able to function well as a teller and thus she requested the Respondent to be transferred to other departments as provided in the company policies.
19. In response, the Respondent instructed her to visit the Respondent's doctor for assessment whether she was suitable to continue working and the Respondent began ignoring any of her communication and requests. The Respondent instructed her to visit one Occupational Dr Mwendwa of Upperhill Medical Centre which she did. However, the Respondent did not communicate on the report or any other instructions. Nevertheless, the Claimant continued to work from home.
20. The Claimant states that her working environment with the Respondent continued to be hostile and she felt like she was walking on eggshells and suffered great psychological trauma from the Respondent from the constant harassment and mistreatment she received from her line manager and the People culture officers who kept calling her to impromptu to meetings. Additionally, she would occasionally receive threats because of her medical condition and she felt that the Respondent was being malicious, discriminative and petty.
21. It is the Claimant's case that the constant harassment inflicted physiological trauma and it affected her physiologically and triggered her to have a psychogenic seizure. This caused her to go to hospital and was admitted to hospital again for a month in the months of June and July 2022 on a new illness which was as a result of the stress caused by the Respondent
22. The Claimant avers that the Respondent began to bully her by sending different people to visit her in hospital to check on what medication she was using. The Respondent also began to circulate her medical reports and holding discussion about her health with other employees in staff meetings and the employees would often make fun and ridicule her because of the seizure. This often led her to suffer great physiological anguish and hindered her recovery progress.
23. The Claimant avers that all the doctors she visited stated that she was capable of working and they recommended her to resume work. She requested the Respondent to allow her to resume work on



several occasions, however, she was instructed to continue to work from home, which she did most of the year 2022 until 9<sup>th</sup> September 2022 when she was instructed to resume work.

24. It is the Claimant's case that the Respondent invited her for three meetings under pretentious reasons since all were introduced to her as official meetings but on arrival she would be bombarded by a different panel at each meeting. This affected the Claimant physiologically as the Respondent fed on her fear of losing her employment and salary taking to mind that the Claimant was servicing loans held with the Respondent facility.
25. It is the Claimant's case that during one of the meetings, the Respondent blamed her for not applying for new roles, however, during her employment and her illness she applied for three different roles that according to her would be fit considering her new health status. The Respondent only responded to one job application and she did not get the job.
26. The Claimant avers that the Respondent ordered her to attend a meeting on 5<sup>th</sup> December 2022, and due to the nature of previous meetings held asked to attend the meeting with a representative. The Respondent threatened that if she did not attend the meeting with any other person she would risk losing her job and/or would affect her relationship with the Respondent.
27. The Claimant avers that the Respondent has refused to issue her with a Certificate of Service for her role in Project Management Officer for a period of three years during her employment.
28. The Claimant avers that in September, the Respondent's medical consultant, Dr. Hafswa Mohamed of Valentis Health undertook a medical report on behalf of the Respondent, whereby she recommended that the Claimant would be able to optimally function in both her personal and professional life while on treatment.
29. The Claimant avers that the Respondent proceeded to terminate her without any substantive reason despite putting in her effort even while ill to ensure that she was productive at her work.
30. It is the Claimant's case that the Respondent based her termination on grounds of incapacitation though she was not incapacitated. The Claimant avers that she has a medical condition that does not hinder her from performing her duties diligently and up until her illegal termination, the Respondent did not show her any medical report that rendered her incapacitated.
31. The Claimant avers that the Respondent discriminated upon her based on her illness and went ahead to state that she is incapacitated thus unable to carry out her duties contrary to Section 5 of the [Employment Act](#) and Articles 27, 41 and 47 of the [Constitution](#).
32. It is the Claimant's case that the Respondent failed to give her an opportunity to change her role into one that would accommodate her health concerns despite her requesting several times to do so. Therefore, the Respondent did not take any action to accommodate the Claimant and give her a chance to perform another role before unfairly terminating her or declaring her incapacitated.

### **Respondent's Case**

33. In opposition to the Claim, the Respondent filed a Memorandum of Defence dated 28<sup>th</sup> November 2023.
34. The Respondent affirms that the Claimant was initially employed as a Project Administrator on contractual basis up to 30<sup>th</sup> June 2016 after extension of her contract. However, the Respondent avers that there are no records to corroborate the Claimant's allegations in respect of the alleged promotions and put the Claimant to strict proof.



35. The Respondent denies that the Claimant has been performing her duties satisfactorily as she was incapacitated and unable to carry out her duties as teller as supported by the Stanbic Medical Board Report dated 14<sup>th</sup> October 2022.
36. It is the Respondent's case that it is stranger that the Claimant underwent surgery in September 2019 and avers that it only has the Claimant's medical reports from the year 2021.
37. The Respondent avers that the Claimant did not perform her role as a teller until November 2022 when she exited. The Claimant was working in the back office with minimal interactions with customers as she was unable to work as teller. Further, the Respondent allowed the Claimant to work remotely due to her illness.
38. The Respondent avers that the Claimant only partially discharged her duties as a result of the fact that she was unwell.
39. The Respondents state that the Claimant could not have reported to work in 2020 when she was out of hospital because this was when COVID-19 was widespread. Further, not all employees, more so tellers, worked from home since September 2019
40. It is the Respondent's case that once an employee exhausts their entitlement to sick leave with full pay, the system automatically updates the payment to half pay for sick leave in accordance with contractual provisions. The Claimant had been sick leave and had taken up 119 days of sick leave which was over and above the contractual entitlement of 56 days sick leave days with full pay; thus there were no illegal deductions of the Claimant's dues.
41. The Respondent contends that the letter which indicated that the Claimant was entitled to half pay was furnished to the Claimant on 23<sup>rd</sup> December 2021 as it could not be shared earlier as the Claimant was hospitalised. Therefore, the deductions were duly explained to the Claimant on 10<sup>th</sup> January 2022.
42. The Respondent states that it directed the Claimant to be assessed by the company doctors, to wit, the Claimant was examined by three doctors - Dr. Mwendwa, Dr Anne Njuguna and Dr Hasfwa.
43. The Respondent denies harassing and issuing threats to the Claimant or that it created a hostile working environment which caused the Claimant to be sick. The Respondent further denies that it discriminated against the Claimant.
44. The Respondent avers that due to the Claimant's continued absence from work due to illness it was necessary for it to obtain medical reports on whether the Claimant was fit to carry out her duties. The Claimant was also advised to collect the medical reports issued by the doctors but she failed to collect the said reports. Additionally, the Claimant did not request to be redeployed.
45. The Respondent denies openly discussing the Claimant's mental health and avers that the meeting was held in the presence of Dr. Hasfwa to assess her fitness and to discuss her engagement with the bank; and any other discussions about the Claimant's mental issues only occurred with Dr. Hasfwa. In addition, during the discussions in respect of the Claimant's fitness to work, the Respondent's People & Culture officials, Chairperson and the Line Manager were present.
46. It is the Respondent's case that none of the bank-appointed doctors in their reports gave a clean bill of health concerning the Claimant's health status for purposes of resuming work.
47. The Respondent denies the Claimant's allegations that she had applied for three jobs but got a decline for one and states that during the meeting, the Claimant could not demonstrate that she had applied for any other roles in the Respondent's job portal.



48. The Respondent states that it issued the Claimant a certificate of service which sets out the dates that she was employed on permanent basis as a teller.
49. The Respondent states that Dr. Hasfwa in his report indicated that "if she was managed correctly, coupled with patient participation and adherence to treatment plans should result in an optimally functional individual in both their personal and professional lives, which does not seem to be the case here." In addition, Dr. Hasfwa recommended that the Respondent should seek a second opinion in respect of the Claimant's fitness to work.
50. Consequently, vide a letter dated 11<sup>th</sup> October 2022, the Claimant was directed to have another evaluation by Dr. Anne Njuguna to assess the prospects of the Claimant's full return to work and the extent to which the Claimant's condition could permit her to fulfill normal job requirements. The Claimant consented to the Respondent obtaining a report on her state of health and fitness for employment.
51. The Respondent states that it accommodated the Claimant for three years and her output was sub-optimal. The Claimant was accommodated by allowing her to work from home and assigned different roles therein.
52. The Respondent states that Dr. Anne Njuguna in her report indicated what the Claimant suffered from and based on this report, the Respondent terminated the Claimant's employment contract on account of prolonged absence from duty due to ill health.
53. The Respondent states that on 16<sup>th</sup> November 2022, the Claimant was issued with a Notice to Show Cause Letter that required a response by 19<sup>th</sup> November 2022. The show cause letter indicated that due to prolonged absence from duty due to ill health which amounted to 292 days since 2019, the Respondent was considering the termination of the Claimant's employment contract. It further indicated that the Respondent had accommodated the Claimant by temporarily allowing her to work from home and reassignment to the back office.
54. The Claimant responded to the Notice to Show Cause letter on 18<sup>th</sup> November 2022. Thereafter, the Bank through a letter dated 5<sup>th</sup> December 2022, invited the Claimant to a hearing on 8<sup>th</sup> December 2022 and the letter further indicated that the outcome of the hearing could have an impact on the contractual relationship between the parties.
55. The hearing was conducted on 8<sup>th</sup> December 2022 and upon consideration, the Respondent terminated the Claimant's employment vide a letter dated 22<sup>nd</sup> December 2022. The Claimant's appeal was not upheld by the Respondent; and the Claimant was informed on the outcome of her appeal in a letter dated 13<sup>th</sup> January 2023.
56. The Respondent states that the Claimant was paid a month's salary in lieu of notice and her dues up to 22<sup>nd</sup> December 2022.
57. The Respondent reiterates that the Claimant's medical reports were held confidentially and the discussions in respect of her capacity to work were held in a cordial and professional manner.
58. It is the Respondent's case that it was justified in terminating the Claimant's employment contract and it upheld the provisions of Section 41 of the *Employment Act*. Consequently, the Claimant is not entitled to any of the reliefs sought in the Memorandum of Claim.



## Evidence in Court

59. The Claimant (CW1) adopted her witness statement dated 27<sup>th</sup> February 2023 as her evidence in chief and produced her filed bundle of documents dated 3<sup>rd</sup> July 2024 and further list of documents dated 6<sup>th</sup> November 2024 as her exhibits.
60. During cross examination, CW1 testified that she was employed by the Respondent as a Project Administrator in 2015 and later became a teller in 2016 upto 2019.
61. CW1 testified that her health deteriorated in September 2019 and she had surgery on 19<sup>th</sup> September 2019. After the sick off, she reported back to work and she was working well until she started having complications.
62. CW1 testified that she contracted Covid 19 while at work and the bank asked her to work from home; she was given the material to work home and she continued doing her work.
63. CW1 testified that vide a letter dated 1<sup>st</sup> December 2021, the bank informed her she had exceeded 52 sick leave days and that Clause AB 29 (iii) provided that the bank deducts half pay. However, she was not served the letter on that date.
64. CW1 testified that she underwent various medical examinations in 2022, however she never received the medical report from Dr. Mwendwa or the one produced in court by the Respondent's by Dr. Hafswa Mohamed.
65. CW1 testified that she only worked from home after she contracted Covid 19.
66. CW1 testified that Dr. Hafswa recommended she get a second opinion which she did and she proceeded to Dr. Njuguna who recommended the Respondent caused high stress levels.
67. CW1 testified that she was on her way to recovery in 2022.
68. CW1 testified that she does not have any evidence to show that she applied for other positions within the bank.
69. The Respondent's witness (RW1) Winfred Kyalo stated she is the Respondent's Employee Relations Manager and adopted her witness statement dated 8<sup>th</sup> May 2024 as her evidence in chief and produced the Respondent's list of documents dated 14<sup>th</sup> May 2024 as her exhibits.
70. During cross examination, RW1 testified that she joined the bank on 1<sup>st</sup> September 2022, however, she is privy of what happened in 2019 from the documents on records.
71. RW1 testified that at the Claimant underwent surgery and was fit to work from home as she was recovering.
72. RW1 testified that the Claimant contracted Covid 19 in June 2020 but she was not asked to work from home.
73. RW1 testified that the Claimant was classified as vulnerable because of medical records and the bank can substitute the employee's roles in such circumstances.
74. RW1 testified that the Respondent has not produced any documents in court to evidence complaints against the Claimant.



75. RW1 testified that she does not know whether the Claimant exhausted her sick leave days in 2022 when she was terminated. As per page 136 of her exhibits, the Claimant had not exhausted her sick leave in 2022 as per the tabulation.
76. RW1 testified that under page 127 of her exhibits, Clause AB 29 of the CBA provided for sick leave being a period of 8 weeks on full pay and up to 8 weeks on half pay in any one calendar year.
77. RW1 further testified that if one-year ends, the sick leave starts afresh the next year as paragraph AB 29(iii) provides that sick leave cannot be accumulated but the period can be extended if necessary.
78. RW1 testified that since the Claimant had not exhausted her leave days in 2022, this should have been an issue to be considered in her termination.
79. RW1 testified that Dr. Hafswa's report did not indicate that the Claimant was incapacitated, it only talks of her limitations.
80. RW1 testified that the Claimant had endometriosis which caused her seizures, migraines, memory loss and swelling of limbs thus incapacitating her. However, there was no complaint of her failure to perform her duties even from her line manager.
81. RW1 testified that she has no report that states the Claimant has seizures in the office, however, the medical reports show incapacity and limitation on the Claimant.

#### **Claimant's Submissions**

82. The Claimant submitted on three issues: - Whether the Respondent's actions were discriminatory and whether the termination was wrongful, malicious and unfair; General damages; and Cost.
83. On the first issue, it was submitted by the Claimant that some aspects of the testimony given by RW1 should be considered as hearsay under the rule of hearsay as she joined the Respondent organization in mid-2022 way after so much of the incidences revolving around the Claimant's employment such as the Covid-19, leave days, evidence on working from home had occurred; Consequently, her testimony cannot be relied on to prove the truthfulness of the Respondent's assertion especially if no accompanying record has been produced or its maker.
84. The Claimant submitted that Section 5 of the *Employment Act* and Article 27 of the *Constitution* specifies that no person should directly or indirectly discriminate against another person on any of the grounds particularly on account of health status or disability.
85. It is the Claimant's submission that the termination letter issued by the Respondent to her dated 22<sup>nd</sup> December 2022, clearly indicates that she was terminated on account of incapacity thus her termination was based on her health status. Whereas, none of the medical reports produced in court indicate that the Claimant is incapacitated to the extent of being unable to discharge her duties. In fact the medical reports suggested the Claimant to be retained and the Respondent to give alternative work station to the Claimant; alternatives which the Respondent totally refused to consider or did not avail to her.
86. The Claimant further submitted that there is no complaint, warning letter or report of secondment of duty due to incapacitation produced by the Respondent, therefore, the whole incapacity issue is fabricated conveniently imagined by the Respondent who was determined to terminate the employment of the Claimant.
87. It is the Claimant's submission that it is their humble understanding that the Clause AB29 of the CBA provides for about 112 sick leaves, in exclusion of the normal annual leave days. Further, the sick



leave days start a fresh every year as they are not accumulated year to year. In this case, the Respondent accumulated the Claimant's sick leave days since 2019; and totally disregarded that in the year 2022, her health had tremendously improved and that she had rarely visited the hospital. The Respondent thus terminated her employment when her condition had been managed.

88. The Claimant submitted that when the Claimant was terminated in 2022, she had not exhausted the days provided for in the law or under the CBA. To conceal this fact, the Respondent in page 136 of their bundle of documents, conveniently and cunningly left out the sick leave days tabulation for the year 2022; as they are aware of their discriminatory, unlawful and unjust towards the Claimant.
89. It is the Claimant's submission that to justify that it was accommodating to the Claimant, the Respondent only concentrated on the period the Claimant was sick; if the Respondent was genuine, it should have produced the full record of the Claimant's employment; this will demonstrate that she was really away from work due to sick leave and only utilized her normal annual leave days.
90. The Claimant submitted that she worked from home based on the Bank's Policy that directed her to work from home and the Respondent further gave her the required resources to operate from home thus the Respondent's allegation in its Notice of Intention to terminate Employment Contract dated 16<sup>th</sup> November 2022 that it allowed her to temporarily work from home was incorrect. Secondly, the Respondent's allegation that she was absent from duty for 264 days since 2019 is incorrect as these were lawful legal leave days. Lastly, the Notice of Intention to terminate Employment Contract does not point out which Medical Report outlined that the Claimant was not fit to work.
91. The Claimant submitted that the medical reports were fashioned to suit a particular intention as they did not indicate the Claimant as unfit to work or incapacitated and they were not objective. Further, RW1 testified that they were jointly prepared in meetings and later signed by the doctor.
92. The Claimant submitted that she was not too ill or sick to work as she discharged her duties efficiently. Additionally, the Respondent did not show any action they took to support the Claimant as required. The duties assigned to her were based on the fact that the Bank policy required her to work from home but on resuming after the Covid-19 policy had been toned down she resumed to work and was undertaking the usual training to return to her role as a teller which was captured in the Notice of Intention to terminate Employment Contract.
93. It is the Claimant's submission that she had resumed back to work and was discharging her duties; no report from her supervisor or doctors gave any evidence that the Claimant has an inability to work. The report on the Claimant's Bundle (Page 118 -119) gives various diagnosis and their various limitations but the limitations were never experienced by the Claimant. The Claimant never experienced the limitations indicated in the report and she discharged her duties diligently and effectively.
94. The Claimant submitted that she was discriminated and consequently unfairly terminated as no medical report declared her as incapable of performing her duties and further the Respondent did not make any effort to accommodate her.
95. It is the Claimant's submission that the Respondent was under the obligation to make further accommodation and have a specific medical report demonstrating the Claimant is not capable of performing; the Respondent did not discharge this burden. She relied in the Supreme Court decision in *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) where the court expressed itself as follows: "The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of



the specified grounds...In view of the circumstances, the burden of proving that the Appellant was medically unfit to continue serving shifted to the Respondent to prove the same using an expert opinion. The Respondent never produced any medical assessment to demonstrate that the Appellant was not capable of performing his duties any more by virtue of his physical incapacity.”

96. The Claimant submitted that she was the only employee subjected to the medical investigation as the same was not done on all employees who were resuming to work after a period of working from home. Further, the medical reports were specifically intended to justify a termination not to find all possible alternatives but to terminate. Reliance was placed in *Gichuru v Package Insurance Brokers Ltd* (supra) citing a South African decision in *Standard Bank of South Africa v. Commission for Conciliation, Mediation & Arbitration and Others* (JR 662/06) (2007) ZALC 94; 4 BLLR 356 (LC); (2008) 29 ILJ 1239 (LC) which held in part: “An enquiry to justify an incapacity dismissal may take a few days or years, depending mainly on the prognosis for the employee’s recovery, whether any adjustments work and whether accommodating the employee becomes an unjustified hardship for the employer. To justify incapacity, the employer has to ——investigate the extent of the incapacity or the injury... (and) .... all the possible alternatives short of dismissal.” [61] Similarly, the onus was on the Respondent to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal. We think that the Respondent was hell bent in wanting to get rid of the Appellant from employment to an extent that they had to circumvent due process in a bid to find fault by conducting extraneous investigations when in fact prior to that they had given him a salary raise due to his hard work. In addition, there was no evidence that investigations were conducted on all other employees during that period and hence he was subjected to different treatment which emanated from his disability. The Respondent also failed to demonstrate that they tried to accommodate the Appellant in his current state. As such, these actions by the Respondent amounted to indirect discrimination due to differential treatment.”
97. On the second issue, the Claimant submitted that the court award her for discrimination and unfair termination as assessed in *Gichuru v Package Insurance Brokers Ltd* (supra) and *LC v Sotik Tea Company Limited* (Petition E002 of 2020) [2022] KEELRC 563 (KLR).
98. On costs, the Claimant urged the court to exercise its discretion by awarding her with cost as held in *David Kiptum Korir v Kenya Commercial Bank & another* [2021] eKLR where the court held: “A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, ...costs must follow the event unless the court, for some good reasons, orders otherwise.”

### **Respondent’s Submissions**

99. The Respondents submitted on three issues: - whether the Respondent had a valid reason to warrant the Claimant’s dismissal; whether the Respondent followed due process in effecting the dismissal; and whether the Claimant is entitled to the reliefs sought.
100. On the first issue, the Respondent submitted that that it had a valid reason to warrant the Claimant’s dismissal; the termination letter dated 22<sup>nd</sup> December 2022 confirms that the Claimant was dismissed on account of incapacity.
101. The Respondent submitted that that pursuant to Section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the Claimant. This was reiterated by the Court of Appeal in *Lockwood Girls High School v Wasike* (Civil Appeal 38 of 2018) [2024] KECA 360 (KLR) (22 March 2024) (Judgment) as follows: “The provisions of section 47(5) of the Act as reproduced above must be read in consonance with sections 107 and 108 of the *Evidence Act*. In that regard, the burden of proof



- in a dispute such as the one before us always keeps shifting. It starts on the side of the employee who alleges unfair termination and must prove on a balance of probability, that his termination was unfair.”
102. It is the Respondent’s submission that the Claimant has failed to establish any prima facie evidence that the Respondent did not have substantive cause to terminate her contract. The Claimant in merely avers that she has established that her dismissal was unfair. No evidence has been tendered to corroborate these arguments and as such, the Claimant has not fulfilled her duty under Section 47(5) of the *Employment Act*.
  103. The Respondent submitted that Section 45(2) of the *Employment Act* requires that an employer must have a valid reason for terminating an employee and that the reason must be related to the employee’s conduct, capacity or compatibility. Given the reports from the medical assessments conducted on the Claimant, the Respondent had a valid reason to terminate her based on her capacity to perform her duties, thus, the Respondent’s actions were in full compliance of the law.
  104. It is the Respondent’s submission that medical incapacity from ill health is a legitimate reason for termination. It relied In Justice Baari J’s decision in Juma (Suing as the Personal Representative of Maurice Otieno Tengu - Deceased) v Kibos Sugar & Allied Industries Ltd [2024] KEELRC 1352 (KLR) wherein it was held: “Ill health is without doubt a valid reason for termination of employment contract subject only to an employer following due process. Section 41 of the *Employment Act* states: - “(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
  105. The Respondent submitted that the Claimant herself testified in court that: she was ill and could not carry out her duties and she has had to attend numerous treatment sessions; she had been away from the office due to illness for more days after exhausting her sick leave leading to her termination; on numerous occasions she was allowed to work from home and to carry out back-office duties including calling customers and following up on cheques; and she was taken for medical assessment prior to attending the capacity meeting.
  106. The Respondent submitted that the court should note and consider the admissions made by the Claimant as guided by the Court of Appeal in Barclays Bank of Kenya Ltd vs Evans Ondusa Onzere [2015] eKLR where the Court held: “It is the duty of the trial court to consider and evaluate the entire evidence on record placed before it. (See Wagude -v- R (1983) KLI? 569). .... The trial court by failing to consider and evaluate the evidence disclosed during cross-examination erred in fact and law thereby arriving at a wrong conclusion... A relevant dictum is the case of Choitram -v- Nazari, ( 1984) KLR 327 where it was stated that admissions need not be in the pleadings; that admissions may be in correspondence or documents which are admitted, or they may even be oral.”
  107. The Respondent submitted that a medical assessment was conducted on the Claimant by Dr. Njuguna, who in her assessment highlighted that the Claimant was no longer fit to continue working as a bank teller. The report further stated that there was no clear date on which the Claimant would have made a full recovery. Subsequently, a second assessment was done following a recommendation by one Dr. Hafswa Mohammed, whose report also outlined that the state of the Claimant’s condition was such that she could not optimally perform her professional duties.
  108. It is the Respondent’s submission that neither the medical assessments before this court nor the treatment notes from the Claimant, give the Claimant a clean bill of health.



109. On procedural fairness, the Respondent that the procedure it adopted leading up to the termination was in line with Section 41 of the Employment Act which requires an employer to; explain to the employee in a language the employee understands the reasons why it was considering the termination; allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons; and hear and consider any explanations by the employee or his representative.
110. The Respondent submitted that in terminating the Claimant for medical incapacity it followed the procedure outlined in *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] KEELRC 810 (KLR) where the court held: “While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee’s ability to resume work in the foreseeable future. Treatment notes and sick off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds. Third, the employer must give the employee specific notice of the impending termination. Failure to follow this procedure even where there is overwhelming evidence of an employee’s inability to work amounts to unfair termination for want of procedural fairness.”
111. The Respondents submitted that they made numerous attempts to try and accommodate the Claimant. The Respondent accommodated the Claimant for 3 years by allowing her to work from home and assigning her different roles.
112. The Respondent placed reliance in *Kenya Plantation & Agricultural Workers Union v Rea Vipingo Plantations Limited & Another* (2015) eKLR, wherein the court observed thus;“Light work is also referred to as limited duty or modified assignment. Where an employee is injured or taken ill during employment the employer has the obligation to reasonably accommodate the employee this goes beyond the grand and exhaustion of sick leave. Reasonable accommodation calls on the employer to genuinely explore ways through which the job performed by the stricken employee can be temporarily modified to suit the medical restrictions of the employee. The employer could limit the working hours for the employee in the same job not necessarily to the 2 hours recommended for children in the Employment (General) Rules. Thirdly the Employer may change the working environment through physical modification of the workplace to suit the affected employee. This may involve the Employer explores the possibility of reassignment of the Employee to a different job within the same enterprise. Alternative work is therefore in the view of this Court not necessarily synonymous with light work. The term ‘light duty’ is very subjective. Some jobs are sedentary yet require the employee applies all metal energy. Other jobs are physical but do not task the brain....., the term ‘light duty’ should therefore be left to the parties negotiation and definition in their labour contracts. The Law cannot be expected to define and regulate everything in an employment relationship. Alternative work should be understood as work which reasonably accommodates the medical restrictions of the affected employee.”
113. The Respondent submitted that the Claimant was accommodated for a period of three years during which the Respondent: assigned the Claimant lighter duties, including back-office tasks rather than her original client-facing role as a teller; she was allocated different responsibilities such as calling customers and collecting cheques; she was allowed to work remotely from home, where she undertook account management tasks; and the Claimant further admitted that she had not worked as a teller, her original role, since 2019 as she had been assigned alternative duties that would not aggravate her medical condition.



114. The Respondent submitted that that there were no other alternative roles/positions its organization to which the Claimant could be redeployed. The Claimant states that she was proficient in project management and procurement and was overlooked for such positions, however, she has not provided any evidence demonstrating her qualifications or showing that she has applied for any positions.
115. It is the Respondent's submission that given the Claimant's health limitations and the medical examination reports, there was no other role that she could perform without experiencing challenges and she made all reasonable attempts to try and accommodate the Claimant.
116. The Respondent submitted that in *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR), the Supreme Court highlighted that the duty lies with the employer to investigate the extent of the employee's incapacity. In the instant case, the Respondent directed the Claimant to be assessed by company doctors.
117. The Respondent submitted that that its decision to terminate the Claimant was based on medical evaluations which were carried out by Dr Mwendwa, Dr Anne Njuguna, and Dr Hasfwa. These assessments were not general treatment notes, but professional medical evaluations aimed at determining whether the Claimant's condition was temporary or permanent, her fitness to work and whether her condition could permit the Claimant to fulfil normal job requirements.'
118. The Respondent submitted that Dr. Mwendwa recommended that the Claimant remains on sick leave and her fitness to resume duty be guided by their assessment. Dr Hasfwa found that the Claimant had not fully worked as a teller and had for the last 3 years or so been working from home, she recommended that: "I recommend that she (the Claimant) gets a second opinion on her medical conditions" and that "the decision to keep her in her current opinion or not lies entirely with the Bank". Lastly, Dr Njuguna found that the Claimant's restrictions were chronic in nature and there will be no date of return to full recovery. Dr Njuguna recommended that the Claimant no longer works as a bank teller as this post could aggravate her conditions.
119. The Respondent submitted that none of the assessments gave the Claimant a clean bill of health and/or recommended that she had the capacity to work as a teller. The medical reports also indicated that the Claimant suffered from seizures, migraines, chronic back pains and memory loss. RW1 also admitted that the procurement department was highly stressful, therefore, the Respondent could not redeploy the Claimant to any other department such as procurement as such a job is highly stressful and could have aggravated her condition.
120. It is the Respondent's submission that that it had legitimate reasons, based on the medical assessments to terminate the Claimant's employment, as, the Claimant was no longer capable of working as a bank teller or any other position that met her qualifications.
121. The Respondent submitted that it issued the Claimant a Notice to Show Cause on 16<sup>th</sup> November 2022 which indicated that the outcome of the hearing could have an impact on the contractual relationship between the parties.
122. The Respondent submitted that it invited the Claimant to a medical capacity hearing which was held on 5<sup>th</sup> December 2022 and the fact that the Claimant was in attendance for that meeting has not been disputed. The Claimant was accorded the opportunity to be heard and to respond to the allegations.
123. The Respondent submitted that Claimant was duly allowed to appear with a representative (Boniface Odhiambo) and was allowed to make representations before the Respondent's committee. During the capacity meeting, the Claimant was presented with the medical assessments and was allowed to respond



to the documents presented by the Respondent. The process culminated in a termination letter issued on 22<sup>nd</sup> December 2022.

124. It is therefore the Respondent's submission that assessed the Claimant's ability to continue working, provided alternative roles, adjusted her work environment, and explored suitable accommodation before concluding that continued employment was not reasonably sustainable. Accordingly, the dismissal met the threshold of procedural fairness under both the Employment Act and the Respondent's internal policies and procedures.
125. On the third issue, the Respondent submitted that the Claimant is not entitled to any declaratory orders as she has not proved that the Respondent has violated her rights through its investigation of her medical condition and/or her dismissal. The Claimant did not prove the violation of her rights under the Constitution; thus, she is not entitled to prayers (a) and (b).
126. To cement this submission, the Respondent relied in Leonard Otieno v Airtel Kenya Limited [2018] KEHC 9063 (KLR) where the Court found as follows: "It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues, Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."
127. On prayer (c), the Respondent submitted that a person alleging discrimination ought to provide evidence to justify the grounds for discrimination in Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR). Therefore, the Claimant bears the overriding obligation to lay substantial material before the Court, in discharge of her evidentiary burden establishing that her treatment at the hands of the Respondent was discriminatory.
128. The Respondent submitted that the Claimant merely claims that she was discriminated against but has not shown how she was singled out among the Respondent's staff on account of her medical condition, therefore, she is not entitled to compensation on the basis of discrimination.
129. On prayer (d), (e) and (f), the Respondent submitted that it has paid all the terminal dues owed to the Claimant, therefore, it is not liable to pay any further damages to the Claimant. Moreover, the Claimant during cross-examination admitted that she is working at another organization.
130. The Respondent submitted that the court cannot award general damages as there are no general damages for breach of the employment contract as held in D. P. Bachheta v Government of the United States of America [2011] KECA 204 (KLR). Further, the Claimant has not strictly proved the violation of her rights under the Constitution thus she is not entitled to the general damages sought under Article 23 of the Constitution.
131. On costs, the Respondent submitted that the Claimant should bear the costs for the suit under Section 28 (1)(e) of The Employment and Labour Relations Court (Procedure) Rules, 2016. The Claimant has failed to establish that the Respondent unfairly terminated her employment and on the other hand, the Respondent demonstrated there was substantive grounds to dismiss her and that it adopted the disciplinary procedure as per the Constitution, the Employment Act and the principle of fair administrative action.
132. I have considered the evidence and submissions of the parties herein. The claimant was terminated from employment vide a letter dated 2/12/22 on account of incapacity. The termination was effective 22/12/22. There are 3 issues for this court's consideration.



1. Whether there were valid reasons to warrant the claimants termination.
2. Whether the claimant was subject to a fair process before termination.
3. Whether the claimant is entitled to the remedies sought.

#### **ISSUE No 1**

133. As indicated above, the claimant was terminated on account of incapacity. From the claimant's evidence, she had suffered some illnesses since 2019 and had to undergo some surgery which resulted on being on sick off. Thereafter at the onset of the Covid 19 pandemic she was asked to work from home after contracting Covid 19.
134. She averred that in December 2021 she was now informed that she had exceeded her 52 sick leave days and as per clause AB 29(iii) she was placed on half pay. She avers that the letter informing her of the sick off and half pay was served upon her late.
135. She produced some email correspondence between her and the respondent which show that the return to work physically which was scheduled for 2<sup>nd</sup> August 2021 had been differed due to the changing environment. In the same email communication, the staff had been split into 2 groups green and yellow team and their work schedule was split into a 2 week cycle from 2/8/21 to 27/8/2021. This was however postponed.
136. From this communication, it is thereof clear that work from home had been on going due to Covid 19 and the resumption of physical work was being considered in August 2021 but also postponed. The claimant testified that in December 2021 she was now informed that her sick leave had exceeded 52 days and was now placed on half pay.
137. The respondents have not demonstrated how the 52 sick leave days came about given that the claimant had been working from home and her physical attendance at work was not expected during the Covid 19. They have not demonstrated that the claimant was assigned tasks which she failed to do due to being sick.
138. Following this information it is also true that the claimant underwent several medical examinations at the request of the respondents. She was expected to visit the respondent's doctors which she did. The reports of the doctors who examined the claimant were submitted before court but respondents aver that the reports never gave the claimant a clean bill of health to resume work. The respondents aver that Dr. Anne indicated that the claimant suffered prolonged ill health and this is why they terminated her services.
139. On 16<sup>th</sup> November 2022 the respondent issued the claimant with a notice of intention to terminate employment contract and requested for a response by 19<sup>th</sup> November 2022. The notice was premised on the fact that the claimant had suffered prolonged ill health of 292 days since 2019 and the respondents had accommodated her for 3 years but were not desiring to terminate her contract. The letter stated as follows:

“ Consumer & HNW Clients

November 16, 2022

AO

C/o Stanbic Bank Kenya Ltd

Kenyatta Avenue Branch



Dear A,

Subject: Notice of Intention to Terminate Employment Contract

Reference is made to the prolonged absence from duty due to ill health with intermittent presence at the workplace since your appointment as a teller in 2019. It is unfortunate that you have been absent from duty for 264 days since 2019 and this has greatly impacted the overall Branch operations and output. Further, the Bank has supported you by allowing you to temporarily work from home and assigned you a back-office role for the same period in spirit of teamwork and Care for Colleague despite being a teller.

We note that you are still undergoing on-job training for the teller role since you were posted at Kenyatta Branch. In addition, the Bank has made numerous arrangements for you to undergo medical treatment and examinations to ascertain your fitness to full return to work. The Medical report has outlined that you are not fit to work in your current role as this may aggravate your condition.

In the view of the foregoing, the Bank seeks your response on why we should not terminate you on the medical grounds. Your written response should reach the undersigned on or before close of business on November 19, 2022.

Yours faithfully,

For: Stanbic Bank Kenya Limited

Martin G. Kariuki

Head, Client Coverage & Consumer Clients

cc. Head, People & Culture

Acknowledgement of Receipt

Name AO

Signature

140. On 5<sup>th</sup> December 2022 the respondent wrote another letter to the claimant inviting her for “an official meeting” in order to give her a chance to respond to the concerns raised in your response. The letter read as follows:

“December 5, 2022

Consumer & High Net-Worth Clients

AO

C/O Stanbic Bank Kenya Ltd

Kenyatta Avenue Branch

Dear A,

Subject: Invitation to Attend an Official, Meeting

Reference is made to a letter dated November 16, 2022, and your response thereof. Consequently, the Bank wishes to constitute an official meeting in order to give you a chance to respond to the concerns raised in your response.



The meeting is scheduled to take place at Stanbic Centre, Mwaluganje Meeting Room on December 8, 2022, at 2:00 PM. During the hearing, you are entitled to come with a witness who is a fellow employee or the Union Representative but not a lawyer or an advocate.

Further note that the outcome of this meeting could have an impact on your contractual relationship with the Bank and it is necessary that you take it seriously. Should you fail to attend, the Bank shall proceed to make a decision with your absence notwithstanding.

In case of any clarification on the same, feel free to reach out to Sylvester Odhiambo.

Yours Faithfully,

For: Stanbic Bank Kenya Limited

Martin Kariuki

Head, Client Coverage & Consumer Clients

CC. Personal File

Acknowledgement of Receipt

Name..... Signature.....Date.....

141. I have looked at the proceedings of this official meeting. At one point the shop steward asked if it was a disciplinary hearing and the response was no. The response was as follows:  

“no this is a hearing to get to understand and deliberate on a situation that is becoming untenable and which is making the bank very concerned. You are invited here as the shop steward to ensure that the process is fair and we guarantee you that”.
142. The claimant however complained of the process she was being subjected to and the fact that the respondents had referred her to see various doctors in January, September and October and the reports had not been shared with her.
143. Following this special meeting the claimant received a termination letter dated 22/12/22. She was informed that the bank had considered the independent medical assessment report and the notice letter and her responses and the meeting held on 8<sup>th</sup> December 2022 and had decided to terminate her employment the same date 22/12/22 on account of incapacity.
144. She was informed of her right to appeal and which she exercised. The appeal was dismissed vide a letter of 13/1/23. From this assessment of the evidence, it is apparent that the claimant had some medical conditions. It is also true that covid 19 set in and due to her prevailing health condition the claimant was asked to work from home. This continued from 2020 to 2022. In the years of 2022, the claimant was subjected to various tests. The results of tests were never supplied to the claimant. The doctors reports supplied by the respondents were never subjected to any panel hearing to determine their viability. There is no report submitted before court from any doctor recommending the claimant is unfit to work.
145. I have also looked at the CBA signed between the respondent and the Association (Kenya Bankers Association) and Banking Insurance and Finance Union (K) BIFU on 15/7/21. As submitted by the claimants, under clause AB29 of the CBA 8 weeks sick leave is provided in exclusion of normal annual leave days and it runs yearly and may not be accumulated from year to year.



146. In case of the claimant, the respondent accumulated the sick leave and punished the claimant for it. Other than this, the claimant was never subjected to any termination hearing as provided for under section 41 of the *Employment Act* 2007 which provides as follows:

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative

147. The reasons given for the termination of the claimant are incapacity due to prolonged illness. The respondents averred that they had already accommodated the claimant for 3 years and found she was incapable of working.

148. In the *Gichuru v Package Insurance Brokers Ltd* (Petition no 36 of 2019) [2021] KESC 12(KLR) (22 October 2021) the Supreme Court laid down the law on when an employer may dismiss on grounds of incapacity. The Supreme Court held that:

“similarly the onus was on the respondent to investigate the extent of the incapacity on the injury and all the possible alternatives short of dismissal.”

We think that the respondent was hell bent in wanting to get rid of the appellant from employment to an extent that they had to circumvent due process in a bid to find fault by conducting extraneous investigations when in fact prior to that they had given him a salary rise due to hard work. In addition to evidence that investigations were conducted on all other employees. The respondent also failed to demonstrate that they tried to accommodate the appellant in his current state. As such, their actions by the respondents amounted to indirect discrimination due to different treatment.

In view of the circumstances, the burden of proving that the appellant was medically unfit to continue serving shifted to the respondent to prove the same using an expert opinion. The respondent never produced any medical assessment to demonstrate that the appellant was not capable of performing his duties any more by virtue of his physical incapacity....”

149. This is exactly what happened to the claimant herein. She was never subjected to any termination hearing. The doctors who examined her were never present at the “special meeting” to present their findings and to allow the claimant to respond accordingly. She was thus condemned unheard and her incapacity was not established.

150. In *Anthony Kipkorir Sang vs AG* (2014) KE ELRC c 752 (KLR) the Hon Judge had made a finding that retiring a police officer on medical grounds due to an injury sustained in line of duty without considering the possibility of reasonably accommodating him/her was a violation of his/her rights.

151. This court makes a finding based on the law and facts herein that the respondent treated the claimant in an inhumane way and terminated her employment without any hearing and without according her any reasonable accommodation to enable her effectively execute her duties.

152. In view of these findings, I find for the claimant and award her as follows:

1. A declaration that the Claimant's employment services with the Respondent were terminated wrongfully, maliciously and or unfairly.



2. A declaration that the claimant's rights of dignity privacy and labour rights were violated by respondents under Article 28, 31(d) and 4(1) of the Constitution of Kenya 2010.
3. 1 months' salary in lieu of notice = Kshs 118,000/-
4. Compensation for unlawful termination and given the unfairness meted against the claimant a young woman whose chances of getting another job are slim, I award her maximum of 12 months in damages = 118,000x12 = kshs 1,416,000/-.
5. I also award her damages for breach of her constitutional rights being kshs 4 million.  
Total awarded kshs 5,534,000/- less statutory deductions.

153. The respondents will pay costs of this suit plus interest at court rates with effect from date of this judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2025.**

**HELLEN WASILWA**

**JUDGE**

