



**Massawa v Shop and Deliver Limited (Employment and Labour Relations
Petition E207 of 2023) [2025] KEELRC 2137 (KLR) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2137 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E207 OF 2023**

HS WASILWA, J

JULY 22, 2025

BETWEEN

BRENDA ACHIENG MASSAWA PETITIONER

AND

SHOP AND DELIVER LIMITED RESPONDENT

JUDGMENT

DIVISION - Petitioner's Case

1. By a Petition dated 19th October 2023, the petitioner sought for the following reliefs; -
 - a. A declaration that the termination of the Petitioner's employment was unprocedural, unfair, unlawful and wrongful contrary to the provisions of Articles 41 and 47 of the Constitution, Sections 41, 43 and 45 of the Employment Act and Section 4(3) of the Fair Administrative Action Act.
 - b. A declaration that the Respondent treated the Petitioner in a degrading and discriminatory manner contrary to the provisions of Articles 27 and 28 of the Constitution by summarily dismissing her from its employment merely because she had been injured in an accident and thus posed a perceived liability to the Respondent.
 - c. A declaration that the Respondent breached the Petitioner's right to fair labour practices, the right to a fair disciplinary and administrative process and denied the Petitioner adequate time and opportunity to respond to the allegations against her.
 - d. An order that Petitioner be compensated by the Respondent as follows:
 - i. One (1) month's salary amounting to KES 61,250.00 in lieu of notice of termination of the Employment Contract;



- ii. Twelve (12) months' earnings amounting to KES 735,000.00 as damages for unfair termination of the Petitioner's employment; and
 - iii. General damages for degrading and inhuman treatment and mental anguish.
 - iv. Applicable interest on the amounts in (i), (ii) and (iii) above from the date of filing suit until payment in full.
- e. The costs of this Petition.

Petitioner's Case

2. The Petitioner avers that she was initially recruited by the Respondent on 7th February 2017 as a Call Agent on a one-year contract with 5 months' probation. Subsequently, she was confirmed on permanent terms vide a letter of appointment dated 25th January 2018 earning a gross monthly salary of Ksh. 35,000 which was increased to Ksh. 61,250 as of the date of her dismissal.
3. The Petitioner avers that she worked diligently and consistently until the Respondent prematurely and unlawfully terminated her services on 3rd February 2023 without any verbal or written warning.
4. The Petitioner avers that she was involved in a road accident on 6th July 2022 and was hospitalised at MP Shah for two days and discharged on 8th July 2022. She later proceeded on a two-week sick leave to recuperate from the injuries sustained during the accident and resumed work on 22nd July 2022.
5. The Petitioner avers that upon resumption to work, she could not bear any weight on her knees and was on crutches, therefore, she requested to work from home and provided a doctor's note to validate the request as required in law.
6. The Petitioner avers that she went for her first review on 5th August 2022 and the doctor requested another four-week work from home, which was officially approved by the Respondent. The Petitioner shared the doctor's note with the Respondent as required and continued working from home. The doctor further requested that the Petitioner should start physiotherapy sessions which she did and continued until November 2022.
7. She went for a second review on 16th September 2022 and doctor then requested a final two-week work-from-home extension. Since it was a Friday, the Petitioner immediately shared the doctor's note on the next working day, Monday, 19th September 2022 via email and requested to be allowed to continue working from home.
8. Upon receipt of the request of 19th September 2022, the Respondent's Growth & Strategy Lead, Mr. Cliff Kinyua, responded and asked the Petitioner to liaise with her new team leader, Ms. Winnie Wanjiku which the Petitioner immediately did. Through a tele-conversation with Ms. Wanjiku, she requested that the Petitioner should report to the office once a week, but the Petitioner volunteered to physically report to the office twice a week subject to facilitation for cab charges as using public transport would have been extremely difficult given her struggle with mobility would endanger her health and would be detrimental to her recovery.
9. The Petitioner avers that Ms. Wanjiku indicated that the Senior Operations and Project Manager, Mr. Andrew Muriithi would get back to her on the approval for cab charges. Mr. Muriithi thereafter instructed her vide an email dated 30th September to report for a meeting the following work day. The Petitioner reported to work on 3rd October 2022 as instructed and apprised Mr. Muriithi on her condition as he had taken over after her accident.



10. Subsequently, on 4th October 2022, the Petitioner sent an email to Mr. Muriithi with feedback that she now had a clean bill of health and in a week's time, she would fully resume physical appearances at the office.
11. The Petitioner avers that her physiotherapy sessions ended on 4th November 2022 but her knee was not improving. On 23rd November 2022, the physiotherapist suggested swimming activities three times a week whereupon she shared the note with the Respondent and her leave request was approved for two days a week as she would swim one day over the weekend.
12. The Petitioner avers that on 13th December 2022 she received an email requesting for a meeting with the subject 'Job shadow way forward' scheduled for the following day. However, she was unable to attend the meeting since she was unwell and requested that the meeting be rescheduled to 16th December 2022 and again to 19th December 2022 as she was still unwell and struggling with her knee's mobility.
13. The Petitioner avers that on 19th December 2022, the Respondent's Head of Human Resource (HR), Ms. Ellina Kabiru called her asking of her whereabouts; whereupon she explained that she was out of office and cited her reasons for taking leave. The Petitioner had requested for a leave day on the system and got approval.
14. Ms. Kabiru further indicated that she needed to have a joint meeting with the Petitioner's supervisor which was scheduled for 20th December 2022 to discuss the Petitioner's work. The other attendees of the meeting were HR Specialist Ms. Dorcas Munyi, Senior Operations and Project Manager Mr. Andrew Muriithi and the Petitioner's Team Leader, Ms. Winnie Wanjiku.
15. The Petitioner avers that during the meeting, she was informed that some of her undisclosed colleagues were complaining of her being in an out-of-office. It was also alleged that she could not be trusted to conduct any assignments as it was never clear when she would return to the office as she was always out for health reasons.
16. It is the Petitioner's case that several other issues were raised against her without being afforded an opportunity to defend herself. Therefore, she was condemned to face disciplinary proceedings for having allegedly taken advantage of the Respondent during the accident and her recuperation period.
17. The Petitioner avers that feeling unheard, she wanted to explain her side of the story, therefore, on 21st December 2022, she wrote an email stating that she loved her work and would not get lost in self-pity. She reiterated that she would not rekindle and surpass her work rate and performance before the accident.
18. The Petitioner avers that she received a Notice to Show Cause (NTSC) letter on 22nd December 2022 and she was required to respond the following day at 5 p.m. The letter laid down the following charges: inability to demonstrate individual work performance from 22nd July 2022 to September 2022; habitual unauthorized absence from work on account of treatment from September to 19th December 2022; and failure to attend a meeting organized by the Senior Operations and Project Manager scheduled for 14th December 2022 without any justifiable reason.
19. It is the Petitioner's case that despite the short notice period, she responded to the NTSC within the stipulated period which was contrary to Clause 6.5.1 (d) of Respondent's Disciplinary Policy providing that a response ought to be given within 5 working days.
20. The Respondent's action further denied her theright to a lawful, reasonable and procedural disciplinary process in contravention of Articles 41 and 47 of the Constitution and in breach of Sections 41, 43 and 45 of the Employment Act as read together with Sections 4(3)(a) of the Fair



Administrative Action Act which provides that the administrator shall give the person likely to be affected by the administrative decision prior and adequate notice of the nature and reasons for the proposed administrative action.

21. The Petitioner avers that she received an email dated 6th January 2023, inviting her for a disciplinary hearing scheduled for 10th January 2023 which she attended. However, despite responding to the NTSC explaining her position and presenting documentary evidence to demonstrate that she had on all occasions been authorized to be out of office, a fact that remains uncontroverted, the Respondent disregarded her response and proceeded to unlawfully terminate her services effective 3rd February 2023.
22. It is the Petitioner's case that the termination letter made no reference to her right to appeal, however, she took the initiative to inquire on the formalities of appeal and appealed the summary dismissal on 9th February 2023.
23. On 2nd March 2023, the Respondent's HR Specialist, Ms. Dorcas Munyi called her for a meeting where she confirmed that the Respondent was not ready to communicate the appeal decision and talks were ongoing. She requested a further 21 days to communicate the outcome of the appeal, which period lapsed without communication despite Clause 7 (c) of Respondent's Disciplinary Policy providing that an appeal has to be determined within twenty-one days.
24. The Petitioner avers that she made a follow up on the matter vide an email dated 23rd March 2023 and she was thereafter invited for an impromptu meeting on 24th March 2023 which eventually took place took place on 28th March 2023.
25. The Petitioner avers that the Respondent absolved her of two of three charges in its letter dated 23rd March 2023 as follows: inadequate work performance during the period 6th July 2022 to 10th October 2022; and failure to attend the meeting scheduled for 14th December 2022 as the Petitioner had demonstrated a willingness to attend the meeting through follow-up emails.
26. She subsequently responded to letter and cited that it appeared to be a second show cause letter and the Respondent denied her the requisite records to prove that she was indeed in the office on the concerned days raised.
27. The Petitioner avers that she wrote a further email on 5th April 2023 protesting lack of assistance on 31st March 2023 with her email records which was key as the Respondent had already terminated the Petitioner's access to the company systems.
28. It is the Petitioner's case that Petitioner avers that having been denied access to her emails and documents stored in her work computer, she was unfairly given a twenty-four (24) hour notice to prepare her response to the notice to show cause contrary to Clause 6.5.1 (d) of the Respondent's Disciplinary Policy.
29. The Petitioner avers that vide a letter dated 12th April 2023, the Respondent indicated that further investigations had been conducted revealing an error in summation of the number of days to 25 instead of 16 days which was still in any case inaccurate. The letter further stated that the Petitioner did not make use of the email logs that were provided whereas she was physically present in office on the alleged days and had no reason to utilise the email logs which would only be used when one was absent from office.
30. The Petitioner avers that after a prolonged wait, the Respondent upheld the irregular decision to terminate her despite clear evidence that she was in the office during the questioned days.



31. It is the Petitioner's case that the Respondent began punishing her before her summary dismissal as before the Christmas break, the Respondent paid to all other employees by 23rd December 2022 save for her. She followed up with the Respondent's HR Mayasa Kiuru and later received her salary on 29th December meaning she had been omitted from the initial payroll.
32. Additionally, in January 2023, the Respondent issued its employees shopping vouchers and end year bonuses save for the Petitioner whose name was not included on the list of staff as confirmed to the Petitioner by HR Mayasa Kiuru upon enquiry.
33. It is the Petitioner's case that the allegations levelled against her throughout the disciplinary process were not only unfounded, baseless and malicious, but also amounted to discrimination and harassment post-termination and the same can only be implied to have been designed to get rid of the Petitioner from the Respondent's service.
34. The Petitioner avers that the decision to terminate her services was arrived at without considering her evidence before the disciplinary Panel. She contends that the dismissal letter is not anchored upon the deliberations of the disciplinary panel but on what the author unilaterally deemed to have been the case.
35. The Petitioner avers that the Respondent's decision to dismiss her was unilateral as it is clear, the Respondent did not consider of her detailed response to the NTSC and her representations at the hearing. The decision further disregarded the fact that she had dutifully and consistently performed her contractual duties contrary to the well laid-down procedures under Sections 41, 43, 44 and 45 of the Employment Act as well as Articles 41 and 50 of the Constitution.
36. It is the Petitioner's case that the Respondent lacked justifiable reasons for the summary dismissal of the Petitioner in contravention of Articles 41 and 47 of the Constitution, Sections 41, 43 and 45 of the Employment Act as read together with Sections 4 (3)(a) of the Fair Administrative Action Act.
37. The Petitioner avers that her summary dismissal was based on unsubstantiated allegations as she was indeed recuperating from an accident. She therefore contends that the Respondent violated her right to inherent dignity and fair labour practices guaranteed under Articles 28 and 41 of the Constitution.
38. It is the Petitioner's case that the Respondent discriminated upon her and compared her performance with that of the other employees thus opting to get rid of her owing to her partial incapacity following the road accident. This is evident from the fact that the Respondent was extremely reluctant to either allow her to work from home during her recovery period and/or facilitate her transportation to the office. The Respondent's action was contrary to Articles 27 and 28 of the Constitution that provides for equality and freedom from discrimination and the right to have her dignity respected and protected.

Respondent's Case

39. In opposition to the Petition, the Respondent filed a Replying Affidavit dated 31st December 2025 sworn by Group General Counsel, Paul Mutegi.
40. The Respondent avers that it employed the Petitioner as a Call Centre Agent vide a contract of employment dated 25th January 2018 reporting to the Customer Service Manager.
41. However, on 3rd February 2023, it issued the Petitioner with a summary dismissal letter terminating her employment on justifiable and lawful grounds of misconduct in accordance with Section 44 of the Employment Act. This decision was subsequently upheld by the Appellate Committee vide a letter dated 12th April 2023 due to the lack of sufficient explanation offered by the Petitioner.



42. It is the Respondent's case that the Petitioner's actions of absenting herself from her place of work without leave or other lawful cause did not adhere to the contract of employment, the [Employment Act](#), the Company's Code of Conduct or Company values which amounted to gross misconduct resulting in the issuance of a Show Cause Letter dated 22nd December 2022 which was in accordance with its Disciplinary Policy.
43. The Respondent avers that the Petitioner responded to the NTSC the same day; upon receipt of the same, she was invited for a disciplinary hearing vide a letter dated 9th January 2023 in line with clause 4 of its Disciplinary Policy. The letter provided that the Petitioner would be given an opportunity to be heard and given sufficient time explain her position and present evidence with regard to the allegations set out during the hearing.
44. The Respondent avers that the Petitioner was given a chance to be heard and to defend herself against the grounds presented in the NTSC to the Disciplinary Committee.
45. It is the Respondent's case that clause 6.5.1(i) of its Disciplinary Policy provided for the Petitioner an opportunity to appeal the decision of the disciplinary committee within five (5) working days from the date of the receipt of the letter concluding the disciplinary matter; with the Petitioner exercising this right of appeal.
46. The Respondent further avers that it is well within the Petitioner's knowledge that clause 7 of its Disciplinary Policy provides for the appeals procedure; and clause 8 provides that where without leave or other lawful cause, an employee absents himself from the place appointed for the performance of her work and has not communicated within 48 hours then repercussion is summary dismissal or termination. The Respondent was therefore guided with these clauses in the termination of the Petitioner's employment by the Disciplinary Committee based on its findings together with the feedback on the appeal where the decision of the Disciplinary Committee was upheld.
47. It is the Respondent's case that the continual absenteeism of the Petitioner from her place of work and late communication of when she will be away from the workplace despite having scheduled physiotherapy sessions disrupted the workflow for her team and the Respondent as a whole.
48. The Respondent avers that clause 10.3 of the Petitioner's contract of employment provided for termination on account of incapacity at its sole discretion of the Respondent. The Petitioner herself admitted in the petition that her incapacity took away 5 months of her employment with the Respondent.
49. The Respondent further avers that clause 10.5 of the contract provided that the Petitioner should follow the absence reporting procedure otherwise the absence would be deemed to be unauthorized. The Respondent's policy further provided that when taking annual leave, it was to be communicated prior and not on the day of taking the leave as has been demonstrated by the Petitioner in the Petition.
50. It is the Respondent's case that clause 12.1.5 of the employment contract provided for termination at the sole discretion of the Respondent on account of the Petitioner's inability due to physical or mental disability for a period of forty days whether or not it be consecutive.
51. The Respondent contends that it followed due process and the termination of the Petitioner's employment was substantially fair pursuant to Section 41 of the [Employment Act](#) which provides for notification and hearing before termination on grounds of misconduct. Additionally, the Petitioner has not furnished the court with any evidence to show that there was lack of due process and substantive fairness in her termination from employment.



52. It is the Respondent's case that the Petitioner has not adduced any evidence before the court of a breach of her rights or shown where the Respondent failed to adhere to due process and substantive fairness, therefore, she is not entitled to the prayers sought and as such the Petition is to be dismissed with costs to the Respondent.

Petitioner's Submissions

53. The Petitioner submitted the Respondent violated its own disciplinary policy as she was denied an opportunity to cross-examine her faceless accusers contrary to Clause 2 (a) of the Respondent's Disciplinary Policy provides that the objective of the disciplinary policy is to ensure all employees are accorded a fair hearing.
54. The Petitioner submitted that she was only granted 24 hours to respond to the NTSC in breach of Clause 6.5.1 (d) of the Respondent's Disciplinary Policy which provides that an employee being taken through a disciplinary process shall be given 5 working days within which to submit a response to a show cause. The Petitioner could not adequately respond within this period.
55. The Petitioner submitted that the Respondent further violated its disciplinary policy by communicating the decision of the appeal after two months whereas Clause 7 (c) provides that the decision of the appeal/review shall be communicated to the employee within twenty-one days from the date of receipt of the appeal.
56. It was therefore the Petitioner's submission that the fact that she was not granted sufficient time to respond to the charges against her will operate to invalidate all the other processes followed by the Respondent thereafter.
57. The Petitioner submitted that the Respondent lacked justifiable reasons for summary dismissal and failed to adduce any evidence setting out the criteria applied in arriving at the decision. These actions were in contravention of the Petitioner's right to a lawful, reasonable and procedural disciplinary process in contravention of Articles 41 and 47 of the Constitution and in breach of Sections 41, 43 and 45 of the Act as read together with Sections 4(3)(a) of the Fair Administrative Action Act which provides that the administrator shall give the person likely to be affected by the administrative decision prior and adequate notice of the nature and reasons for the proposed administrative action.
58. The Petitioner submitted that the Respondent summarily dismissed her employment on unsubstantiated allegations when she was indeed recuperating from an accident in violation of the Petitioner's right to inherent dignity and fair labour practices guaranteed under Articles 28 and 41 of the Constitution.
59. The Petitioner submitted that the Respondent discriminated upon her due to her partial incapacity following the road accident and compared her performance with that of the other employees thus opting to get rid of her owing to the liability that she now posed to the Respondent's business. This is evident from the fact that the Respondent was extremely reluctant to either allow her to work from home during her recovery period and/or facilitate her transportation to the office. This was in breach of Article 27 of the Constitution which provides for equality and freedom from discrimination.
60. It is the Petitioner's submission that Section 47 (5) of the Employment Act limits of an employee's burden of proof to a claim of unfair termination are to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks substantive justification and or is procedurally flawed. Once that is done as is in the instant suit, the burden shifts to the employer. She relied in the decision of Charles Wanjala Watima v Nyali Golf & Country Club Ltd [2013] KEELRC 704 (KLR).



61. The Petitioner submitted that the Respondent lacked a justifiable substantive reason to terminate her services. The Respondent was merely getting rid of a perceived business liability, the Petitioner who was an injured employee whose performance had deteriorated due to health reasons. The Petitioner contends that this is clear from the disciplinary process despite the fact that the main charge of poor performance was eventually abandoned after she valiantly defended herself.
62. It is the Petitioner's submission that the Respondent discriminated upon her by firing her on grounds of her partial incapacity and also denied her timely payment of her December 2023 salary as well as the gifts and bonus granted to other employees to her exclusion.
63. This was in breach of Section 5(3) of the Employment Act which provides that no employer shall discriminate directly or indirectly, against an employee on grounds of disability in respect of termination of employment or other matters arising out of the employment; and Section 5(7) that provides that the employer shall bear the burden of proving that the discrimination did not take place as alleged.
64. The Petitioner submitted that the Supreme Court in *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR), held that an employer has a duty to accommodate an employee with an established physical incapacity; and the same standard applies in cases of absence on account of sickness or injury. An employer must show that accommodating the needs of an employee with physical incapacity would cause it undue hardship and therefore there was a need to act to mitigate the hardship.
65. It is therefore the Petitioner's submission that the Respondent's argument that it was entitled under its policies to unilaterally terminate the services of any employee who was absent from work for more than forty days, whether or not it be consecutive is absurd as it would well imply that the Respondent's policies actually contradict express provisions of Section 30 as read with Section 41 of the Employment Act.

Respondent's Submissions

66. The Respondent submitted on three issues: whether the Petitioner's termination of employment was unprocedural, unfair and unlawful; whether the Petitioner was treated in a degrading and discriminatory manner; and whether the Petitioner is entitled to costs.
67. On the first issue, the Respondent submitted that it adhered to procedural fairness as enunciated in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] KEELRC 920 (KLR) as follows:-

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”



68. The Respondent submitted that the Petitioner was issued with a NTSC dated 22nd December 2022 which detailed the three charges raised against her and required her to respond to the charges by the 23rd December 2022.
69. It is the Respondent's submission that clause 6.4.3 of its Disciplinary Policy provides that a response to the show cause letter is to be submitted within five working days, the number of days being the maximum. Therefore, requiring the Petitioner to respond by 23rd December 2022 was in order and where the time to respond was inadequate, the Petitioner should have requested for additional time to enable her respond to the same.
70. The Respondent further submitted that the Petitioner responded to the NTSC on 22nd December 2022 despite knowing that she was in a position to put in the response by the 23rd December 2022. Thus, the Petitioner's assertion that the time provided to respond to the show cause letter was inadequate does not stand.
71. The Respondent submitted that the Petitioner's response to the show cause letter admits to the contents in the NTSC being a reiteration of the contents of the meeting held on the 20th December 2022 between the Petitioner with her line manager, senior operations and project manager, HR specialist-regional support and the then head of HR concerning her work conduct. Thus, the duration of response in the NTSC was adequate as the same was based on the meeting held on the 20th December 2022 with the Petitioner having knowledge of the same.
72. The Respondent submitted that being unsatisfied with the Petitioner's response, she was invited disciplinary hearing and it was affirmed that the hearing will take place subject to the its policies and procedures. The Petitioner was well aware of the rights accorded to her under clause 4 of the Disciplinary Policy in accordance with Section 41 of the *Employment Act* provides that:
- “.....e) During the hearing, an employee shall be given the opportunity to be heard and given sufficient time to explain their position, and present evidence with regard to the allegations set out during the hearing. f) Employees shall have the right to be accompanied by an employee as an independent witness during any investigation interviews, disciplinary hearings or subsequent appeal hearings. j) Disciplinary action shall normally relate to behavior and conduct at work but may relate to behavior and conduct outside work where this has a direct bearing on an employee's suitability for employment or the Company's reputation. Each case shall be considered according to the circumstances in line with Company policies and applicable laws.”
73. The Respondent submitted that it has proved the minutes of the disciplinary hearing that the hearing took place on 10th January 2023. Further, during the hearing, , the Petitioner admitted to taking annual leave in place of sick leave as a justification for absenting herself from work; failing to communicate to her manager her intention of being away from work for therapy despite having knowledge of therapy schedule beforehand; and that she was aware that prior to proceeding on leave she had to give a one to two week notice and share a work handover report, which she failed to do. The Petitioner also confirm that the annual leave she applied for was done the morning of the actual day she was proceeding on leave without notice. This shows that the Petitioner admitted that she had been in the wrong and took responsibility.
74. It is the Respondent's submission the Petitioner was subsequently issued with a dismissal letter dated 3rd February 2023 in line with clause 6.3 of its disciplinary policy and Section 44 of the *Employment Act*, having found that the Petitioner was culpable of neglecting to perform her work as required; absenting



herself from work without lawful cause; and knowingly failing to follow her manager's instructions concerning work assigned.

75. The Respondent submitted that the Petitioner was well aware that clause 6.5 of its disciplinary policy provides for the right to appeal the results of the disciplinary hearing, therefore, she is misleading the court when she states she was not informed of this right. Additionally, the Petitioner appealed the decision vide her letter dated 9th February 2023 indicating she was well aware of the appellate process provided in the disciplinary policy.
76. The Respondent submitted that in response to the Petitioner's appeal, it varied the decision of the disciplinary panel by exonerating her on the charge of inadequate work performance and insubordination, however, it requested clarity from the Petitioner on the charge of absenteeism vide its decision of 23rd March 2023. The Petitioner subsequently responded vide a letter dated 31st March 2023 requesting for information to enable her respond which was granted vide the Respondent's letter of 12th April 2023.
77. The Respondent submitted that having reviewed the decision of the disciplinary panel, the appeal panel, partially varied it and upheld the decision to summarily dismiss the Petitioner for failure to give sufficient explanation in the 16 days she was absent from work.
78. It is the Respondent's submission that it provided the Petitioner procedural and substantive fairness from the NTSC to the disciplinary hearing and the appellate process, pursuant to its disciplinary policies and procedures and the *Employment Act*.
79. On the second issue, the Respondent submitted that they were accommodating to the Petitioner once they were made aware of her condition and was amenable to her working from home from 22nd July 2022. Upon the first doctor's review, the Respondent accommodated her by giving her a month's extension to stay home and a further two weeks upon her second doctor's review. Additionally, the Petitioner was emailed on 29th September 2022 requesting her to report to the office, however, she was unable to do and reported to work on 11th October 2022.
80. It is the Respondent's submission that by allowing the Petitioner to work remotely during her recovery period, is a clear demonstration of its accommodation of the Petitioner. It relied in the Supreme Court case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) which discussed the duty to accommodate as expressed in the 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) thus:

“The Bank's duty to accommodate stems from its overriding obligation not to discriminate. Quite simply, the Bank had a legal obligation to accommodate Ferreira to ensure that she could continue to work.¹⁸⁰ It also bore a reverse onus of ensuring that it did not compel Ferreira or encourage her to terminate her employment.¹⁸¹ From the following it emerges that the Bank did encourage her to leave...A bald refusal to allow a half day work demonstrates such a high degree of inflexibility about a frequent form of accommodation that the court is fortified in its conclusion that the Bank had no intention of retaining her in its employ from the outset. The Bank was preoccupied with its own needs rather than investigating how Ferreira could be accommodated. If it seriously wished to persuade the court that a half day job was unjustified, it should have motivated fully.”



81. The Respondent further submitted that it accommodated the Petitioner despite her breach of the leave policy and absence reporting procedure as provided under clause 10.5 of her contract of employment.
82. On costs, the Respondent submitted that having proved that the petition lacks merit, it is entitled to the costs in the matter.
83. I have examined all the averments and submissions of the parties herein. The issues for this courts consideration are as follows:
 1. Whether this petition is properly before court.
 2. Whether the termination of the petitioner was fair and justified.
 3. Whether the petitioner’s rights under the Constitution were flouted.
 4. Whether the petitioner is entitled to the remedies sought

Issue No 1

84. The respondents filed a preliminary objection before this court averring that this petition should have been filed before the magistrate’s courts bearing in mind the salary of the petitioner at time of dismissal and in relation to the gazette notice donating jurisdiction to the magistrates.
85. The gazette notice no 6024 of 22/6/2022 indeed delegated jurisdiction to magistrates to hear employment cases where an employee’s salary is Kshs 80,000 and below.
86. It is however imperative to note that the section 5.8(3) of the Magistrate’s Courts Act chapter 10 laws of Kenya provides as follows

“nothing in this act may be construed as conferring jurisdiction on a magistrates court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the bill of rights”.
87. It is worth noting that the petitioner herein has indeed filed this petition seeking compensation for infringement of her rights under the Constitution. This in essence ousts jurisdiction from the magistrates court. It is therefore my finding that the preliminary objection then has no merit and is disregarded with the finding that this court is properly seized of this petition.

Issue No 2

88. The petitioner has averred that she was involved in an accident which caused her injuries rendering the performance of her duties hampered. The issue of her being injured is not contested by the respondents and this is evident from the petitioner’s documents that she was indeed injured in the accident on 6/7/22.
89. There is also evidence submitted by the petitioner that she was granted 10 days off duty on 8/7/22 from MP Shah Hospital. She exhibited a medical report dated 22/7/22 from MP Shah Hospital indicting that she had been treated at the facility following the accident and had been discharged on crutches following a fracture on her tibia. She was allowed 4 weeks prior to her next orthopaedic review.
90. The petitioner kept updating the respondents of her treatment plan and what the doctors recommended. She was further allowed to continue work from home as she proceeded with her physiotherapy sessions. She also took some leave time to attend to the physiotherapy sessions. A report



of 23/11/22 from the doctor indicates that she also needed to pursue swimming as an exercise in order to improve her knee movement.

91. On 22/12/22, the petitioner was served with a show cause letter indicating that her performance from 22/7/22 to 4th September 2022 was wanting. It is worth noting that this is the period after the said accident. She was also accused of habitual unauthorised absenteeism on account of treatment from the month of September 2022 to December 2022. Further, it was indicated that she failed to attend a meeting organised at the office on 14th, 16th and 19th December 2022 without justifiable reasons.
92. The petitioner responded to the show cause letter explaining her position and denying any culpability. On 6/1/2023 she was invited for a disciplinary hearing on the 10th January 2022 at 4 to 5 pm.
93. The petitioner avers that she attended the disciplinary hearing but indicate that the respondents disregarded her explanation and proceeded to unlawfully terminate her services with effect from 3/2/23. She avers that she appealed the termination and on 2/3/23 the HR called her and informed her that they were requesting for 21 days to communicate the outcome of the appeal. The period lapsed without any communication and petitioner made a follow up on 23/3/2023. The respondents then informed her that the appeal absolved her of 2 charges i.e inadequate work performance and failure to attend meeting scheduled on 14/12/22.
94. They now served her with a 2nd show cause letter and thereafter invited her to respond. She avers that she complained of inadequacy to respond due to lack of access to the office email after the dismissal. It is the petitioner's case that she was denied an opportunity to present her case and cross-examine her accusers. She avers that she was not given adequate time to prepare and present her case and even get access to the documents on evidence she would have relied upon due to her being locked out of office.
95. The petitioner has also submitted that the respondents failed to adhere to their own HR manual and in particular clause 6.5.1 of the manual which provides that a response to show cause letter should be made within 5 days. This indeed is true that the petitioner was given 3 days to respond.
96. It is also true that clause 7 of the respondent's manual provides that an appeal should be determined within 21 days. In case of the petitioner, the appeal results were communicated after 2 months. It is evident that the respondent failed to adhere to their own rules. The petitioner has averred that she was never given an opportunity to defend herself. The respondents have averred that the petitioner was given an opportunity to state her case. The respondents have however not demonstrated how the proceedings were conducted. No minutes of the disciplinary hearing have been submitted. There is no indication that the petitioner was given an opportunity to cross-examine her accusers and even present her case.
97. Section 41 of the [Employment Act](#) 2007 states 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 of his choice present during this explanation.
98. Section 45(2) of the [Employment Act](#) 2007 also states as follows:

(2) A termination of employment by an employer is unfair if the employer fails to prove——

 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason——



- i. related to the employees conduct, capacity or compatibility; or
- ii. based on the operational requirements of the employer; and
- c. that the employment was terminated in accordance with fair procedure

99. In absence of any demonstration that the respondent followed the above provisions in the disciplinary process, it is my finding that the disciplinary process was flawed and therefore the dismissal of the petitioner was unfair and unjustified.

Issue No 3

100. Having found that the petitioner was not accorded a fair disciplinary hearing nor the process envisaged under the respondent's manual followed, I do agree with the petitioner that her rights vide article 41 of the Constitution were breached. Article 41 of the Constitution provides as follows:

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;
 - (b) to reasonable working conditions;
 - (c) to form, join or participate in the activities and programmes of a trade union; and
 - (d) to go on strike

101. It is also true that given the manner the petitioner was treated following an accident for which the respondents were well aware of, it is my finding that she was subject to an inhumane and degrading treatment and her right under article 28 of the Constitution which provides as follows was breached:-

28. Every person has inherent dignity and the right to have that dignity respected and protected.

102. She was also denied a fair administrative action as provided for under article 47 of the Constitution. It is therefore my finding that the petitioner's rights under the Constitution was breached and she was therefore entitled to damages.

Issue No 4

103. Having found as above, I find for the claimant and return a verdict for her as follows:-

- a. A declaration that the termination of the Petitioner's employment was un procedural, unfair, unlawful and wrongful contrary to the provisions of Articles 41 and 47 of the Constitution, Sections 41, 43 and 45 of the Employment Act and Section 4(3) of the Fair Administrative Action Act.
- b. A declaration that the Respondent treated the Petitioner in a degrading and discriminatory manner contrary to the provisions of Articles 27 and 28 of the Constitution by summarily dismissing her from its employment merely because she had been injured in an accident and thus posed a perceived liability to the Respondent.
- c. A declaration that the Respondent breached the Petitioner's right to fair labour practices, the right to a fair disciplinary and administrative process and denied the Petitioner adequate time and opportunity to respond to the allegations against her.
- d. An order for payment to the petitioner of 1 months' salary in lieu of notice = Kshs 61,250/-.



- e. 10 months' salary as compensation for the unfair termination = $61,250 \times 10 =$ Kshs 612,500/-
- f. Payment of general damages to the petitioner for breach of her constitutional rights equivalent to 3 million.
Total = Kshs 3,673,750/- less statutory deductions.
- g. The respondents to pay costs of this suit and interest on the amount awarded at court rates with effect from the date of this judgement.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JULY 2025.

HELLEN WASILWA

JUDGE

