



**AWW (Suing as Next Friend and Mother of GWW) v Central Bank of Kenya (Cause E888 of 2022) [2024] KEELRC 13585 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13585 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E888 OF 2022  
HS WASILWA, J  
DECEMBER 18, 2024**

**BETWEEN**

**AWW ..... CLAIMANT**

**SUING AS NEXT FRIEND AND MOTHER OF GWW**

**AND**

**CENTRAL BANK OF KENYA ..... RESPONDENT**

**Duty of the employer to assess and accommodate an employee’s mental condition before dismissal on grounds of mental incapacity.**

*The claimant instituted the suit on behalf of her daughter who was employed by the Central Bank of Kenya as subordinate staff from 2009. In 2018, she was diagnosed with bipolar mood disorder and schizoaffective disorder, conditions that impaired her executive functions. Despite the respondent’s knowledge of her mental health challenges, she was subjected to disciplinary proceedings, culminating in her termination in 2020. The court found that the respondent failed to accommodate the employee’s condition and treated her in a discriminatory manner. Consequently, the court awarded her Kshs. 5,008,000 in damages for wrongful termination and discrimination.*

Reported by John Ribia

**Labour Law** – employment – duties of an employer – where an employee was mentally incapacitated – where the mental incapacity led to the employee’s dismissal - burden to investigate extent of mental incapacity/injury - whether an employer that dismissed an employee due to mental incapacity/injury had the burden to investigate the extent of the incapacity/injury and all the possible alternatives short of dismissal - whether dismissal from employment due to mental incapacity where the mental state was not investigated by the employer and where the employer did not take measures to accommodate the employee due to the mental state was unfair - whether subjecting a mentally incapacitated employee to disciplinary proceedings without accommodating their mental condition was inconsiderate and resulted in an unfair hearing - Employment Act (cap 226) sections 5, 41, and 44(4); Persons with Disabilities Act (cap 133) section 15.



*Constitutional Law – fundamental rights and freedoms – freedom from discrimination – indirect discrimination – where an employee was mentally incapacitated – where the employee was dismissed without the employer taking efforts to accommodate the employee - whether the failure of an employer to accommodate an employee with a declining mental state was indirect discrimination – Constitution of Kenya article 27; Employment Act (cap 226) sections 5, 41, and 44(4); Persons with Disabilities Act (cap 133) section 15.*

### **Brief facts**

The claimant instituted the suit on behalf of her daughter who was employed by the Central Bank of Kenya as subordinate staff from 2009. In 2018, she was diagnosed with bipolar mood disorder and schizoaffective disorder, conditions that impaired her executive functions. Despite the respondent's knowledge of her mental health challenges, she was subjected to disciplinary proceedings, culminating in her termination in 2020.

The claimant contended that the respondent failed to provide reasonable accommodations or adequate medical support, as required under the law. The respondent, in its defense, maintained that the employee was afforded medical care and due process during disciplinary proceedings related to absenteeism.

### **Issues**

- i. Whether an employer that dismissed an employee due to mental incapacity had the burden to investigate the extent of the incapacity and all the possible alternatives short of dismissal.
- ii. Whether the failure of an employer to accommodate an employee with a declining mental state was indirect discrimination.
- iii. Whether dismissal from employment due to mental incapacity where the mental state was not investigated by the employer and where the employer did not take measures to accommodate the employee due to the mental state was unfair.
- iv. Whether subjecting a mentally incapacitated employee to disciplinary proceedings without accommodating their mental condition was inconsiderate and resulted in an unfair hearing.

### **Held**

1. The claimant was an employee of the respondent and she had mental health related issues which were known to the respondent. They supported the claimant and accorded her medical help. She had lucid moments at the time they issued her with notice to show cause and also subjected her to a disciplinary hearing.
2. The claimant had lucid moments at the time of hearing but there was no medical evidence to show that indeed she was in a fine state of mind to enable her defend herself. The hearing envisaged was such that the employee had an opportunity to defend herself and their state of mind must be healthy in order to comprehend what was happening.
3. The respondents knew the claimant was unwell but they still asked her to appear for a hearing which was inconsiderate in view of the claimant's mental state. Other than the claimant not being accorded a proper hearing, the claimant being mentally unwell deserved also some preferential treatment which was referred to as reasonable accommodation.
4. The onus was on the respondent to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal. 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 her a salary raise due to her hard work. There was no evidence that investigations were conducted on all other employees during that period and hence she was subjected to different treatment which emanated from her disability.
5. The respondent also failed to demonstrate that they tried to accommodate the appellant in her current state. The actions by the respondent amounted to indirect discrimination due to differential treatment. Whereas the respondents accommodated the claimant by allowing her attend medical treatment which



was indeed part of the medical scheme but there was no indication that they went out of the way to accommodate her.

6. The respondent proceeded to hear the claimant casually and failed to help her alleviate her problem. The report from the doctor even indicted that her work made her situation worse. The respondents treated the claimant in a discriminatory manner due to her mental capacity and should therefore compensate her accordingly. The dismissal of the claimant was unfair and unjustified.

*Claim allowed.*

### **Orders**

- i. *Compensation equivalent to 12 month's salary given the cruel treatment the respondent subjected the claimant to and made her lose her livelihood never to return again 12 x kshs 84,000/- = kshs 1,008,000/-.*
- ii. *Damages for discrimination on account of mental disability being Kshs 4 million.*
- iii. *Total awarded Kshs 5,008,000/- less statutory deduction plus costs of this suit and interest at court rates with effect from the date of the judgment.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Barclays Bank of Kenya Ltd & Africa Group (S.A) Ltd v Gladys Muthoni & 20 others* Civil Appeal 296 & 301 of 2016; [2018] KECA 718 (KLR) - (Explained)
2. *Gichuru v Package Insurance Brokers Ltd* Petition 36 of 2019; [2021] KESC 12 (KLR) - (Explained)
3. *Kenya Revenue Authority v Reuwel Waitihaka Gitahi & 2 others* Civil Appeal 66A of 2017; [2019] KECA 300 (KLR) - (Explained)
4. *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal 42 of 2015; [2017] KECA 329 (KLR) - (Explained)

#### **Statutes**

#### **Kenya**

1. Constitution of Kenya article 27- (Interpreted)
2. Employment Act (cap 226) sections 5, 41, 44(4)- (Interpreted)
3. Mental Health Act (cap 248) In general - (Cited)
4. Persons with Disabilities Act, 2014 (Act No 4 of 2025) section 15 - (Interpreted)

#### **Advocates**

None mentioned

## **JUDGMENT**

1. The claimant instituted this suit by a memorandum of claim dated September 9, 2022. The claimant, suing as the mother and next friend of GWW, a person of unsound mind, avers that the respondent wrongfully terminated Ms W's employment while disregarding her documented mental health condition. The claimant states that Ms W was employed as part of the respondent's subordinate staff in 2009 but developed mental health issues, including bipolar mood disorder and schizoaffective disorder, in 2018. These conditions impaired her executive functions and were known to the respondent.
2. The claimant contends that despite the respondent's knowledge of Ms. W's mental illness, the respondent failed to provide comprehensive medical care as required under the [Mental Health Act](#). Instead, it subjected her to a disciplinary process, purporting to consider her responses while disregarding her impaired capacity to defend herself. This disciplinary action culminated in her termination, which the claimant describes as discriminatory, unfair, and actuated by malice.



3. The claimant further asserts that the respondent's actions violated Ms W's right to non-discrimination under the Constitution and international labor standards. The respondent is accused of failing to accommodate her mental disability, as required by law, and treating her as though she were fully capable of participating in the disciplinary process. The claimant highlights that Ms W was still able to perform her cleaning duties despite her condition and that her termination has caused undue hardship to her and her three children.
4. The claimant seeks judgment against the respondent for:
  - i. Damages for wrongful termination.
  - ii. Damages for discrimination against a person suffering from mental disability.
  - iii. Alternatively, restitution to employment with full benefits.
  - iv. Costs of the suit.
5. The claimant asserts that the termination violated principles of fairness, compassion, and respect for persons with disabilities, contrary to statutory and constitutional provisions.
6. In a sworn affidavit and a statement of memorandum both dated September 9, 2022, the Claimant, AWW, as the mother and next friend of GWW, avers that G, employed by the respondent since 2009, developed mental health issues in 2019, including clinical depression and schizoaffective disorder. Despite the Respondent's knowledge of her condition, G was subjected to a disciplinary process she could not fairly defend herself against, resulting in her termination. The claimant contends this was discriminatory and unfair and seeks damages for wrongful termination and discrimination or G's restitution to employment with full benefits, as well as costs of the suit.

### **Respondent's Case**

7. In a memorandum of reply dated February 21, 2024, the respondent denied the claimant's allegations of unlawful termination, discrimination, and failure to provide care and respect. The respondent admits certain descriptive averments regarding the parties and acknowledges that the claimant sustained injuries from a motorcycle accident in 2019 and that her medical condition was known to the Respondent since 2018. However, the Respondent asserts that it facilitated the claimant's medical care and supported her during her treatment.
8. The respondent denies the allegation that it failed to commit the claimant to a medical facility, stating that the primary responsibility rested with her next friend. It further avers that the claimant was lucid and aware of the disciplinary proceedings initiated due to absenteeism and other work-related issues, as evidenced by medical reports received during the material time. The respondent asserts that the decision to terminate the claimant's employment followed due process, including multiple show-cause letters issued between 2016 and 2020, and a hearing before the Disciplinary and Grievance Tier II Committee.
9. The respondent contends that it provided the claimant with a comprehensive medical cover and substantial support during her treatment, as outlined in her employment contract. The respondent denies the claimant's allegations of malice, ill will, or lack of empathy and asserts that the termination was lawful, fair, and procedurally sound.
10. The respondent maintains that the claimant is not entitled to any of the reliefs sought in the claim and prays for the dismissal of the suit with costs.



11. In the claimant's reply to the respondent's memorandum of reply dated March 7, 2024, the claimant reiterates that the respondent owed her a duty to provide adequate medical care and support for her mental health condition but failed to do so. The claimant avers that the respondent aggravated her situation by failing to reduce work pressure or assign her lighter duties, despite requests and the recommendations of medical staff. She further asserts that the respondent summarily dismissed her while fully aware that her performance issues stemmed from her mental illness, despite her prior exemplary service of over 10 years. The claimant maintains that the dismissal was unfair and discriminatory, and she prays for the dismissal of the respondent's memorandum of reply, which she contends raises no triable issues, with costs.

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

12. The claimant, through her mother and next friend, filed a suit dated September 9, 2024, alleging unlawful, unfair, and discriminatory termination by the respondent. The claimant, employed by the Respondent since 2009 as a subordinate staff member, began suffering from mental health issues in 2019, including bipolar mood disorder and schizoaffective disorder. Despite being aware of her medical condition through various reports and communications, the respondent failed to provide reasonable accommodations, such as lighter duties or a transfer to a less stressful environment. The claimant argues that the respondent's inaction exacerbated her mental health condition, ultimately leading to her termination.
13. The claimant submits that her termination was discriminatory, citing article 27 of the *Constitution of Kenya 2010*, which prohibits discrimination, and section 5 of the *Employment Act*, which mandates equal opportunity and accommodation for persons with disabilities, including mental disability. The claimant alleges that her requests for a transfer or reduced workload were ignored, and she continued to face undue pressure from her workplace, aggravating her condition.
14. The claimant references multiple medical reports from Amani Counselling Centre, Dr Mark, Dr Njuguna, and Dr Ng'ang'a, all of which highlight her mental health challenges and recommend support and reasonable accommodations. The claimant argues that the respondent failed to implement these recommendations and instead subjected her to a disciplinary process without considering her mental health status, violating her right to a fair hearing and the tenets of natural justice.
15. The claimant seeks damages for wrongful termination, damages for discrimination on the grounds of mental disability, or alternatively, reinstatement to her position with full benefits, as well as costs of the suit. The claimant submits that the respondent's actions amounted to neglect, discrimination, and a breach of statutory and constitutional obligations to protect her rights as an employee with a disability.
16. The claimant further submitted that the respondent acted in bad faith by disregarding her medical condition, which had been consistently documented in medical reports from 2015 to 2022. These reports highlighted her struggles with bipolar mood disorder and schizoaffective disorder, conditions that impaired her reasoning and executive functions. Despite being aware of her condition, the respondent failed to implement reasonable accommodations as required under section 15 of the *Persons with Disabilities Act* and section 5 of the *Employment Act*.
17. The claimant alleged that the respondent's refusal to transfer her to a less stressful work environment or reduce her workload aggravated her mental health challenges. She argued that this refusal, coupled with disciplinary proceedings for absenteeism directly linked to her condition, constituted indirect discrimination. The claimant also noted that the respondent's decision to subject her to disciplinary proceedings without due consideration of her medical status violated the principles of fairness and natural justice.



18. The claimant relied on the Supreme Court decision in *Simon Gitau Gichuru v Package Insurance Brokers Ltd*, where the court emphasized the employer's duty to investigate an employee's medical condition and provide reasonable accommodations before resorting to dismissal. She further cited section 41 of the *Employment Act*, asserting that her termination was procedurally unfair as she was not afforded proper representation during the disciplinary hearings despite her mental impairment.
19. In conclusion, the claimant prayed for compensation for discrimination amounting to Kshs 5,000,000, damages for unlawful termination totaling Kshs 1,008,000 (equivalent to 12 months' salary), and one month's salary in lieu of notice at Kshs 84,000. The claimant also sought costs of the suit and interest on the awarded sums from the date of judgment until full payment. She emphasized that the respondent's actions were harsh, discriminatory, and inconsistent with its legal obligations to accommodate her condition.

### **Respondent's Written Submissions**

20. The respondent submits in opposition to the claim initiated by the claimant, who filed a memorandum of claim on September 9, 2022. The claimant's evidence includes a Witness Statement and a List of Documents dated September 9, 2022. The respondent filed a memorandum of reply on February 21, 2024, presenting evidence through Ms Elizabeth W Njogu, Deputy Manager of Human Resource Legal Services, and relying on documents dated April 5, 2024.

### **Factual Background:**

21. The claimant was appointed to the position of support staff by the respondent on March 25, 2009, with a salary of Ksh 40,040.70, effective from April 1, 2009. Her salary eventually rose to Ksh 84,000 before her resignation in 2015 due to personal challenges. The respondent intervened by referring the claimant to Amani Counselling Centre for support. After several counseling sessions, it was recommended that the resignation be rescinded and the claimant referred for psychiatric support.
22. The claimant continued to receive medical care and counseling until 2018, when she was diagnosed with a schizoaffective disorder resulting from a 2015 motorcycle accident. Despite receiving regular treatment, the claimant exhibited recurring absenteeism from work.
23. In 2020, the respondent issued two show-cause notices due to absenteeism, but the claimant's medical condition was considered before initiating disciplinary procedures. The claimant's employment was ultimately terminated in 2020 due to gross misconduct, following disciplinary procedures.

### **Issues for Determination:**

24. Discrimination in employment:  
Whether the claimant faced discrimination during her employment, culminating in her termination.
- Lawfulness and procedure of termination:  
Whether the termination was lawful, procedural, and in line with natural justice principles.
- Entitlement to reliefs:  
Whether the claimant is entitled to the reliefs sought.



### **Discrimination in Employment:**

25. The respondent denies that the claimant was discriminated against.

The claimant's submission on discrimination refers to a non-existent provision of the *Employment Act*, specifically section 5(3)(a), which addresses discrimination based on marital status, race, ethnicity, etc., but does not cover "mental status." The respondent argues that the claimant erroneously relied on an incorrect interpretation of the law. The respondent emphasizes that the burden of proof lies with the claimant to establish discrimination. The claimant failed to provide evidence or witnesses to substantiate her claims of discrimination on account of her mental illness.

26. The respondent further cites *Barclays Bank of Kenya Ltd & Africa Group (SA) Ltd v Gladys Muthoni & 20 others* [2018], which stresses that without presenting oral evidence or proof, the claimant's claim of discrimination cannot be upheld. Additionally, in *Opejeta Ranching Ltd vs. David Wanjau Muboro* [2017], the court emphasized that disparate treatment must be shown to be based on impermissible grounds, such as mental illness. In conclusion, the respondent submits that there was no discrimination against the claimant, particularly as she received extensive medical care throughout her employment.

### **Lawfulness and Procedure of Termination:**

27. The respondent asserts that the claimant's termination was lawful and followed proper procedures in line with natural justice. The respondent adhered to the disciplinary procedures outlined in its Disciplinary & Grievance Policy. The claimant was provided with show-cause letters and given an opportunity to explain her absenteeism, but her repeated absences ultimately led to her termination due to gross misconduct.

28. The respondent complied with all procedural requirements and ensured that the claimant's medical condition was taken into consideration during the disciplinary process. The termination was therefore both lawful and procedural.

### **Lawfulness of the Termination**

29. Substantive justification for termination. The respondent submits that the termination of the claimant's employment was substantively justified. As per section 44(4) of the *Employment Act, 2007*, absenteeism without lawful cause may amount to gross misconduct, thereby justifying summary dismissal. The claimant's repeated absenteeism without informing or seeking permission from her supervisor constitutes valid grounds for dismissal under the Act.

30. The respondent respectfully draws this honourable court's attention to the established principle that the onus is on the employer to prove that there were sufficient reasons to justify dismissal. However, it is not required of the employer to meet a high standard of proof akin to criminal proceedings. As stated in *Kenya Revenue Authority v Renwel Waitihaka Gitahi & 2 others* [2019] eKLR, the employer must only demonstrate that it "genuinely believed" the grounds for dismissal existed based on the facts available at the time.

31. In the present case, the claimant admitted to the absenteeism in her responses to the respondent's notices to show cause, and the respondent gave the claimant every opportunity to explain her actions before proceeding with the dismissal. Thus, the respondent had reasonable grounds to dismiss the claimant.

32. Procedural fairness. The respondent submits that it followed the procedural requirements outlined in the *Employment Act, 2007*, specifically section 41, which requires an employer to inform the employee



of the reasons for dismissal and to provide the employee an opportunity to respond to those allegations. The procedural fairness steps followed by the respondent are as follows:

- i. Notice to show cause: The claimant was issued with a notice to show cause on the March 11, 2020, where the respondent outlined her absenteeism without permission and sought her explanation, which the claimant provided on the March 24, 2020.
  - ii. Subsequent notices: A further notice to show cause was issued on the April 29, 2020, highlighting additional instances of unauthorized absenteeism. The claimant was again asked to respond to the allegations.
  - iii. Disciplinary hearing: The claimant was invited to appear before the Disciplinary and Grievance Tier II Committee, where she was given an opportunity to respond to the charges against her.
  - iv. Final decision: On the July 9, 2020, the Disciplinary Committee made the decision to terminate the claimant's employment due to continued unauthorized absenteeism, in accordance with the respondent's policies and procedures.
33. The respondent submits that it complied with all the necessary procedural requirements, ensuring that the claimant had the opportunity to explain her actions and had a fair hearing before the termination decision was made.

#### **Claimant's entitlement to reliefs sought**

34. Damages for wrongful termination. The respondent submits that the claimant has failed to prove, on a balance of probabilities, that her termination was unlawful. The claimant's termination was based on valid and justifiable grounds (unauthorized absenteeism), and the respondent followed all necessary procedures. Therefore, the claim for damages for wrongful termination must fail. The Respondent submits that, in the absence of an unlawful termination, the claimant is not entitled to any form of compensation.
35. Damages for discrimination on the basis of mental disability. The respondent respectfully submits that there is no legal basis for a claim based on discrimination due to the claimant's mental disability. The *Employment Act* does not specifically provide for discrimination on the grounds of mental health. However, the respondent acknowledges that the *Constitution of Kenya* prohibits discrimination on any grounds. The evidence before the court shows that the respondent provided the claimant with all necessary medical care following her accident in 2015, including care for the residual effects of the accident, and there was no discrimination against the claimant based on her mental health. Further, the claimant has not provided any evidence to show that she was treated differently from other employees in a similar situation. As such, this claim should be dismissed.
36. Restitution to employment with full benefits. The respondent submits that this alternative prayer for reinstatement is without merit. The respondent has proven that the termination of the claimant's employment was lawful, both substantively and procedurally. There is no basis for reinstating the claimant to her previous position, and the request for restitution should be dismissed.
37. Costs. The respondent submits that the successful party should be awarded costs, as per the general rule in civil litigation. In this case, the respondent has shown that the termination was lawful and procedurally fair, and the claimant's claim should be dismissed with costs.
38. Based on the facts and legal principles discussed above, the respondent submits that the claimant has failed to prove that her termination was unlawful. The respondent followed both substantive and procedural fairness in terminating the claimant's employment. Therefore, the respondent respectfully



- requests that this honourable court dismiss the claimant's suit in its entirety, with costs to the respondent.
39. Further, the respondent's witness, Elizabeth W Njogu, Deputy Manager of HR Legal Services at the Central Bank of Kenya (CBK), testified in a witness statement dated April 5, 2024, that the claimant was employed by CBK from April 1, 2009 in the position of Support Staff, with a salary that later increased to KES 84,000. The claimant, however, faced significant personal and medical challenges, which led to her tendering a resignation in August 2015. CBK, upon recognizing her medical condition, rescinded the resignation after a series of counselling and psychiatric sessions, with the claimant receiving ongoing support from Amani Counselling Centre and Dr Marx MO Okonji.
  40. Despite these accommodations, the claimant continued to struggle with absenteeism due to her mental health issues, and in 2019, following several unauthorized absences, CBK issued her a final warning for gross misconduct. In 2020, further unauthorized absences prompted CBK to issue show-cause letters, leading to a disciplinary hearing where the Claimant's medical background and history of absences were considered. The Disciplinary & Grievance Tier II Committee ultimately resolved to terminate her employment on grounds of continued misconduct despite CBK's extensive efforts to accommodate her condition. The witness, therefore, maintained that at no point did CBK discriminate against the claimant on the basis of her medical condition, but rather acted in accordance with its policies to manage the claimant's absenteeism. It is the respondent's position that the claimant's suit is without merit, and should be dismissed with costs, as CBK provided necessary medical support and acted reasonably and fairly in line with the respondent's policies.
  41. I have examined all the evidence and submissions of the parties herein. There is no doubt that the claimant was an employee of the respondent and she had mental health related issues which were known to the respondent.
  42. The respondent even admitted that they supported the claimant and accorded her medical help. They however averred that she had lucid moments at the time they issued her with notice to show cause and also subjected her to a disciplinary hearing.
  43. The claimant has averred that she was subjected to a disciplinary hearing when she was sick hence was not given an opportunity to defend herself.
  44. The respondents have averred that the claimant had lucid moments at the time of hearing but there is no medical evidence to show that indeed she was in a fine state of mind to enable her defend herself. Section 41 of *Employment Act* 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.
  45. The hearing envisaged is such that the employee has an opportunity to defend herself and it therefore follows that their state of mind must be healthy in order to comprehend what was happening.
  46. Indeed the respondents knew the claimant was unwell but they still asked her to appear for a hearing which in my view was inconsiderate in view of the claimant's mental state.



47. Other than the claimant not being accorded a proper hearing, the claimant being mentally unwell deserved also some preferential treatment what is referred to as reasonable accommodation.
48. The issue of reasonable accommodation was discussed in the Supreme Court of Kenya decision Petition No 36 of 2019 *Simon Gitau Gichuru v Package Insurance Brokers Ltd* where the Supreme Court made pronouncements as follows:

“The respondent ought to have considered the report or even in the least conducted its own investigation as to the appellant’s medical condition. We find justification 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) 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.”

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.

49. The respondents submitted that they accommodated the claimant by allowing her attend medical treatment which was indeed part of the medical scheme but there is no indication that they went out of the way to accommodate her as was stated in the above case (Petition No. 36 of 2019) where the Supreme Court of Kenya stated further as follows:

“We are cognizant of the fact that the respondent was compassionate to the appellant by facilitating the appellant’s treatment and even increasing his salary a month after him resuming work. In our view, the salary increase could not be said to have been a sympathetic act by the respondent as this was done on the basis of his great performance at work. The duty to accommodate ought to have been demonstrated after the fact of his now evident physical incapacity. Seemingly, only when it was clear that he needed assistance to move around that the respondent proceeded to suspend the appellant which eventually led to his dismissal. We reiterate that the respondent had an obligation to consider the medical report and to further accommodate the appellant by devising ways that could ease his movements unless they proved that accommodating the appellant would cause undue hardship to the company.”



50. The respondent in my view proceeded to hear the claimant casually and failed to help her alleviate her problem. The report from the doctor even indicted that her work made her situation worse. It is my finding that the respondents treated the claimant in a discriminatory manner due to her mental capacity and should therefore compensate her accordingly.
51. Having considered the law and the facts of the case, I find that the dismissal of the claimant was unfair and unjustified. I proceed to award her as follows:
1. Compensation equivalent to 12 month's salary given the cruel treatment the respondent subjected the claimant to and made her lose her livelihood never to return again 12x kshs 84,000/- = kshs 1,008,000/-.
  2. Damages for discrimination on account of mental disability being kshs 4 million.
  3. Total awarded kshs 5,008,000/- less statutory deduction plus costs of this suit and interest at court rates with effect from the date of this judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER, 2024.**

**HELLEN WASILWA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**HELLEN WASILWA**

**JUDGE**

