



**LC v Sotik Tea Company Limited (Petition E002 of 2020)
[2022] KEELRC 563 (KLR) (10 March 2022) (Judgment)**

Lucy Chepkemoi v Sotik Tea Company Limited [2022] eKLR

Neutral citation: [2022] KEELRC 563 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

PETITION E002 OF 2020

ON MAKAU, J

MARCH 10, 2022

BETWEEN

LC CLAIMANT

AND

SOTIK TEA COMPANY LIMITED RESPONDENT

Court awards a person living with disability Kshs. 2,000,000 as general damages for discrimination in the termination of employment.

The main issues before the court were whether termination of employment based of the employee’s visual impairment violated the employee’s right to non-discrimination, fair labour practices and fair administrative action, and whether an employer meeting costs of treatment and continued payment of salary when the disabled employee was away absolved the employer from liability for indirect discrimination. The court held that meeting costs of treatment and continued payment of salary when the employee was away did not absolve the employer from liability for indirect discrimination. What mattered was whether after the said treatment the employer provided special facilities or modification of the existing facilities to reasonably accommodate the person with disability so as to enable him/her to continue working. The termination of the petitioner’s services was by all means unjustified and discriminatory contrary to article 27 of the Constitution, section 5 of the Employment Act and section 15 of the Persons With Disability Act (PWD Act). The petitioner was awarded Kshs. 2,000,000 as general damages

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – right to fair labour practices - right to non-discrimination – right to fair administrative action – where an employee had their employment terminated on account of a visual impairment - whether termination of employment based of the employee’s visual impairment violated the employee’s right to non-discrimination, fair labour practices and fair administrative action - Constitution of Kenya, articles 20(2), 27(1), (4), (5), 28, 41, 42(1), 47, and 54(1); Employment Act (Cap 226) section 5 (2), (3); 45; 46; 49 (1); Employment And Labour Relations Court Act (Cap 8E) section 12; Persons With Disabilities Act (Cap 133) section 12(i); 15



Labour Law – fair labour practices – employment rights of disabled employees - where an employee had their employment terminated on account of a visual impairment - whether termination of employment based of the employee's visual impairment could be considered reasonable and fair - whether an employer meeting costs of treatment and continued payment of salary when the disabled employee was away absolved the employer from liability for indirect discrimination - Employment Act (Cap 226) section 5(2), (3); 45; 46; 49 (1); Employment And Labour Relations Court Act (Cap 8E) section 12; Persons With Disabilities Act (Cap 133) section 12(i); 15

Brief facts

The petitioner's employment was terminated by the respondent based on medical grounds due to a visual impairment. The petitioner's main case was that her rights were violated through the termination. She contended that she was discriminated contrary to article 27 of the Constitution and her right to fair labour practices and fair administrative action were under article 41 and 47 of the Constitution were also violated through the said termination. The petitioner further contended that the employer dismissed her without providing her with reasonable accommodation to enable her to continue working. The respondent on the other hand contended that it gave the petitioner the necessary support by meeting her costs of treatment, costs of training and even gave her fully paid sick leave beyond the statutory entitlement.

The respondent contended that no doctor presented any medical report showing that the petitioner was capable of performing her duties. They also contended that the petitioner was not capable of performing her duties as a secretary and she did not show that her literacy in Braille and assistive technology could enable her to perform the duties. They further contended that even after allocating the petitioner duties in the stores that did not help matters because there was ever present danger of work-related injuries from accidental falling or bumping into objects and moving trucks. They mentioned an incident where she accidentally fell down leading to many days sick off to protect her from further injuries.

Issues

- i. Whether termination of employment based of the employee's visual impairment violated the employee's right to non-discrimination, fair labour practices and fair administrative action.
- ii. Whether termination of employment based of the employee's visual impairment could be considered reasonable and fair.
- iii. Whether an employer meeting costs of treatment and continued payment of salary when the disabled employee was away absolved the employer from liability for indirect discrimination.
- iv. Whether based of the facts of the case, due process was followed in terminating the employment of the petitioner.

Held

1. Section 45 of the Employment Act barred an employer from terminating his employee's contract of service without valid and fair reason, related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements.
2. Disability was not inability. Disability alone did not translate to incapacity to perform employment duties. When an employer cited disability as the reason for dismissing his employee, he had to prove that the employee lacked capacity to perform their duties. That was grounded on section 43(2) of the Employment Act which defined reason for termination that the matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. Section 46(g) of the Act provided that an employee's disability did not constitute a fair reason for dismissal or imposition of disciplinary penalty:
3. The claimant was dismissed for alleged incapacity due to her visual disability. Before the dismissal the petitioner had undertaken training on the use of Braille and the white cane. The burden shifted to the employer to prove that they had provided the petitioner with reasonable accommodation and failed to perform her duties, or that the facilities required to accommodate the petitioner could not reasonably be expected to be provided by it.



4. Section 15 (2) of the Persons With Disability Act provided that, an employer shall not be deemed to have discriminated a person with disability if the special facilities or modifications, whether physical, administrative or otherwise, were required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.
5. The employer admitted that it never provided the petitioner with reasonable accommodation. The respondent also admitted that it transferred the petitioner to work in the main stores but she fell and got injured leading her being placed in sick leave for many days. That pointed to the respondent's recklessness because the transfer was not accompanied by special facilities to accommodate the petitioner.
6. The respondent had failed to prove that the petitioner lacked capacity to perform her duties even if she was afforded reasonable accommodation. They also did not prove the special facilities required to accommodate the petitioner were not reasonably within its ability. The respondent failed to provide special facilities or modification as required by the law in order to accommodate the petitioner's disability. The reason upon which the respondent terminated the petitioner's employment contract was not valid and fair within the meaning of section 45 and 46 of the Employment Act.
7. Under section 46 of the Employment Act, termination for any of the reasons set out thereunder including disability was automatically unfair. However in any other case termination was unfair within the meaning of section 45 of the Act if the termination was not done in accordance with a fair procedure. The procedure followed was fair if the employee was accorded a fair hearing as set out by section 41(1) of the Act.
8. Subject to the meetings held between the petitioner and the respondent before the decision to terminate the petitioner was reached, fair procedure was followed before terminating the petitioner's employment contract as required by section 41 and 45 of the Employment Act.
9. The termination of the petitioner's services was by all means unjustified and discriminatory contrary to article 27 of the Constitution, section 5 of the Employment Act and section 15 of the Persons With Disability Act (PWD Act). The employers' duty to accommodate person with disability sprang from the overriding obligation not to discriminate. Every employer had a legal obligation to accommodate such employees to ensure that they remained in employment.
10. Meeting costs of treatment and continued payment of salary when the employee was away did not absolve the employer from liability for indirect discrimination. What mattered was whether after the said treatment the employer provided special facilities or modification of the existing facilities to reasonably accommodate the person with disability so as to enable him/her to continue working.
11. If the employer chose to terminate without such accommodation, then it was immaterial how much money was paid to the employee as treatment cost and salary during the period of treatment. Liability for discrimination would accrue in favour of the employee under section 5 of the Employment Act and section 15 of the PWD Act. The termination was also an affront to petitioner's right to fair labour practices and fair administrative action.
12. The petitioner was entitled to two months' salary in lieu of notice and 10 months' gross salary as compensation for the unfair termination. 3 years had lapsed since the termination and therefore under section 12 of the Employment and Labour Relations Court Act, the court could not reinstate an employee after 3 years from the date of separation. The petitioner worked for the respondent for over ten years and she did not cause her termination by misconduct.

Petition allowed.



Orders

- i. *The petitioner was awarded with the following:*
 1. *Notice Kshs 26,000*
 2. *Compensation Kshs 130,000*
 3. *General damages Kshs 2,000,000*
 4. *Total Kshs 2,156,000*
- ii. *The awards were subject to statutory deductions.*
- iii. *The petitioner was awarded costs plus interests at court rates from the date of the instant judgment.*

Citations

Cases

1. Chitavi, Anthony Mkala v Malindi Water & Sewerage Company Ltd (Cause 64 of 2012 (Originally Nairobi Cause 754(N) of 2009); [2013] eKLR) — Explained
2. Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019; [2021] KESC 12 (KLR)) — Followed
3. Masinde, Joy Brenda v Law Society of Kenya & Attorney General (Petition 54 of 2015; [2015] KEHC 507 (KLR)) — Explained
4. Muema, Juliet Mwongeli v Smollan Kenya Limited (Cause 104 of 2017; [2019] KEELRC 281 (KLR)) — Explained
5. Sang v Attorney General (Cause 2408 of 2012; [2014] KEELRC 752 (KLR)) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 20 (2); 27(1), (4), (5); 28; 41; 42(1); 47; 54(1) — Interpreted
2. Employment Act, 2007 (Act No 11 of 2007) — section 5 (2), (3); 45; 46; 49 (1) — Interpreted
3. Employment And Labour Relations Court Act, 2011 (Act No 20 of 2011) — section 12 — Interpreted
4. Persons With Disabilities Act, 2003 (Act No 14 of 2003) — section 12 (i); 15 — Interpreted

International Instruments

1. Universal Declaration of Human Rights (UNDHR), 1948 — article 7

Advocates

None mentioned

JUDGMENT

1. The petitioner was employed by the respondent as a secretary on 5/4/2006 and his starting basic salary was Kshs 13000 per month. She worked well until July 2014 when she fell ill and was diagnosed with eye complications. Despite getting treatment from several doctors, she lost her eyesight in 2016.
2. As a result of the foregoing, the petitioner enrolled at the Kenya Institute of Special Education in 2017 to learn how to cope with her visual impairment. She was also registered with the National Council of Persons living with disability (NCPLWD) registration number NCPWD/P/XXXXXX.
3. By a letter dated March 9, 2017, the respondent issued the petitioner with a notice of intended termination of employment on medical ground. The petitioner presented the letter to the NCPWD and the council protested the move by the respondent by several letters. However, the respondent terminated the petitioner's employment by the letter dated 19/5/2017 citing medical grounds especially visual impairment.
4. The petitioner was aggrieved and brought this petition on November 27, 2020, alleging that her rights as guaranteed in the Constitution and statutes were violated through the termination. She contended



- that she was discriminated contrary to article 27 of the Constitution and her right to fair labour practices and fair administrative action were under article 41 and 47 of the Constitution were also violated through the said termination.
5. She averred that the employer did not provide her with reasonable accommodation to enable her continual working for the company but instead went ahead to dismiss her on account of disability. Such conduct by the employer, according to the petitioner was outright discrimination.
 6. As regards the violation of her right under the statutes, the petitioner averred that the employer violated section 5(3) of the Employment Act which provides for non-discrimination of employees at work place. She further averred that the employer breach section 46 of the Act, which provides that it is not a fair reason to dismiss an employee on account of disability. She also averred that the termination was unfair within the meaning of section 45 of the Act because the reason for the termination was not related to her conduct, capacity or compatibility. She maintained that she was capable of performing her duties and produced certificates of capacity.
 7. The petitioner further accused the employer of violating her right to non-discrimination as guaranteed under section 15 of the PWD Act.
 8. She further averred that the employer violated its own policy, which provides in paragraph 2.14, that the company is committed to providing equitable employment opportunity at all levels within the organization without discrimination or harassment based on disability among others.
 9. In view of the aforesaid matters, it is the petitioner's case that the actions by the respondents were unfair, unjustified and discriminatory against her. She also deems the same as undermining International Conventions which protect the rights of PWD particularly article 7 of the Universal Declaration of Human Rights and article 27 of the Convention on rights of PWD. Therefore she prays for the following reliefs:-
 - a) A declaration that the petitioner's fundamental rights and freedoms as espoused under articles 20(2), 27(1), 27(4), 27(5), 42(1), and 47(1) have been contravened and grossly violated by the respondent.
 - b) A declaration that the petitioner's termination on medical grounds was unfair, lacks merit, is discriminatory and contravention of the basic requirements of good labour practices and guided by the Employment Act cap 226, the Constitution of Kenya, 2010 and the Persons with Disabilities Act
 - c) An order that the petitioner be reinstated back to her position with facilitation or implements (Braille machines) and her requisite salary.
 - d) That this honorable court be pleased to order the respondent to pay the claimant compensation based on section 49(1) of the Employment Act.
 - e) That this honourable court finds that the respondent's actions were discriminatory against the claimant and order the respondent to pay the quantum for discrimination.
 - f) That this honourable court be pleased to grant such after order or orders as may be just and appropriate.
 10. The respondent opposed the petition *vide* the replying affidavit sworn on November 15, 2021 by its Assistant Manager Stores Mr Amos Andalia. Although the respondent does not deny that it terminated



the petitioner's employment on medical grounds, it denies the allegation that the termination was unfair, unlawful and discriminatory.

11. The respondent averred that after the petitioner suffered eye problems, she was unable to perform her usual duties and she was asked to choose another area of work. She then chose to work in main stores where she was assigned only light duties of pack fasteners, which was occasional and only taking about two hours whenever the work arose.
12. The respondent further averred that in 2016, the petitioner lost hereyesight completely and doctors recommended that the petitioner be trained to use Braille and white cane to enable her cope with life in her new health condition. The respondent averred that it supported the petitioner throughout by facilitating all the necessary medical treatment costs and training cost on the use of Braille and white can. It also averred that it gave her sick leave for an extended period with full salary.
13. However, according to the respondent it became evident that the petitioner would not be able to perform her duties as required due to the visual impairment. She also faced the risk of bodily injuries from slip/trip or bumping on stationary structures. The respondent cited an incidence whereby the petitioner accidentally fell at the stores leading to a long sick-off of 187 days with full pay.
14. The respondent averred that a review was undertaken after the said incident and it was found that due to the nature of the wok carried over by the company there was ever-present danger that the petitioner might be the unfortunate victim of a work place accident or pumping into stationary structures or moving trucks. Besides, according to the respondent, there was no possibility that the petitioner would be able to undertake her employment duties even after acquiring knowledge in the use of Braille and with all the technology being availed.
15. As a consequence of the foregoing matters, the respondent averred that he opted to discharge the petitioner from her employment on medical grounds. The respondent avers that the termination was preceded by various meetings with the petitioner where her medical conditions and recommendations by various doctors were discussed.
16. The respondent maintained that the reason for the separation was valid because the petitioner was unable to perform the duties she was contracted to perform, and also the alternative positions available. Besides the work environment was not safe for the petitioner necessitating the need to terminate her employment.
17. The respondent further maintain that the procedure followed before the termination was fair because it engaged the claimant in discussions during the three years period in which she was given an opportunity to make representations in support of her case. Therefore it denied that it violated petitioner's right to fair labour practices and fair administrative action.

Submissions

18. The petitioner submitted that the respondent violated her constitutional rights by terminating her employment on account of physical disability contrary to article 27 of the *Constitution*, section 12(i) of the *PWD Act* and section 5(2) of the *Employment Act*. She maintained that her failure to accord her reasonable accommodation amounted to discrimination.
19. She further submitted that the respondent has admitted that it did not have the facilities to accommodate her in the office, and as a result, she had been involved in a work related accidents. The respondent expected her to continue working in the same conditions as the rest of the staff, which according to her was unreasonable.



20. She further faulted the respondents' opinion that she was not likely to undertake her normal duties even after acquiring Braille literacy and other related skills. She maintained that the respondent discriminated against her by terminating her services on medical grounds without first providing her with reasonable accommodation contrary to article 27, 28 and 54 of the Constitution and also section 15(6) of the PWD Act. Therefore, she prayed for judgment as prayed on the petition.
21. For emphasis, she relied on Supreme Court decision in Simon Gitau Gichuru v Package Insurance Brokers Ltd [2021] eKLR and this court's decision Juliet Mwangeli Muema v Smollan Kenya Limited [2019] eKLR and Anthony Kipkorir Sang v Attorney General [2014] eKLR where the employers were found to have discriminated their employees by terminating their services on medical grounds, instead of putting in place special facilities in order to accommodate the employees with disability. The courts then went on to award the aggrieved employees compensatory damages.
22. The respondent on the other hand submitted that it has proved by evidence that it reached the decision to discharge the petitioner from employment after considering the underlying cause other in ability to perform, namely her failing eyesight and her safety at the work place. She further submitted that for 3 years it facilitated the petitioner with medical treatment costs, training costs, reassigned her lighter duties, and further placed her on extended sick leave with full payment to mitigate her burden of work.
23. The respondent further submitted that she involved the petitioner in the entire decision making process by giving her opportunity to be heard as per the minutes filed. However it maintained that the petitioner did not indicate how the assistive technology would assist her undertake her main duties without injury to herself in the factory setting.
24. The respondent submitted that the termination of the petitioner's employment contract was in accordance with section 45(5) of the Employment Act. For emphasis it relied on the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKRL where the court discussed the procedure for a fair termination of employment contract by the employer.
25. As regards the alleged violation of the petitioner's rights under article 27(4) and 28 of the Constitution section 54(1) of the Constitution through the termination on medical ground, the respondent submitted that the petitioner did not disclose or highlight in what manner it discriminated her in the decision to terminate the contract. It submitted that it has elaborately demonstrated that the decision was arrived at after a fair process and in consideration of the petitioner's incapacity to safely and adequately perform her duties in the company.
26. It relied on section 5(3)(b) of the Employment Act which provides that it is not deemed not discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
27. It further relied on section 15(2) of the PWD Act which provides that a person is not deemed to be discriminated if the act or omission alleged to constitute discrimination was
 - (a) not wholly or mainly attributable to disability of the said person;
 - (b) the disability in question was relevant consideration in relation to the particular requirements of the type of employment concerned or,
 - (c) Special facilities or modifications, whether physical, administrative or otherwise, are at the work place to accommodate the person in with a disability, what the employer cannot reasonably be expected to provide.



28. The respondent maintained the view that had the petitioner demonstrated that she was able to work with assistive technology without risk of injury to herself, then she would have been accommodated in the company. For emphasis it relied on the case of *Joy Brenda Masine v Law Society of Kenya another* [2015] eKLR where the court held that mere expression of the preferred qualification does not amount to discrimination under article 27 of the *Constitution* as it is not premised on any of the grounds set out under article 27(4) nor can the stated preference be said to amount to an illegitimate consideration.
29. The respondent distinguished the instant case from *Simon Gitau Gicheru v package Insurance Brokers Ltd, supra*, because in the said case, the employer failed to accommodate the needs of a disabled employee and that amounted to discrimination.
30. The respondent also distinguished the instant case from *Juliet Muongeli Muema v Smollen Kenya Ltd* because in that case the employee demonstrated how assistive technology would have helped her undertake her duties while the petitioner herein has failed to demonstrate by evidence how she would be able to work with impaired vision and that she would not be at the risk of injury at the work place.
31. Finally, she distinguished the instant in that case from *Antony Kipkorir Sang* case because in that case the employee demonstrated that she was able to work in the dispensary and as a taxi driver after the injury while in this case. In the respondent the claimant did not tender evidence to show that she was able to safely and adequately perform her duties in the structure, and work site with the aid of assistive technology.
32. As regards the reliefs sought, the respondent submitted that the petitioner has not proved her case and as such, no reliefs are merited. Specifically it submitted that the petitioner did not establish the factors relevant for reinstatement. In addition the respondent submitted that it awarded petitioner the following:
 - (a) two months' salary in lieu of notice
 - (b) *Ex gratia* payment equivalent two months' salary
 - (c) Annual leave (22 days in 2016/2017 and 4 days for 2018)
 - (d) Sick off days taken in excess of the statutory minimum with full pay
 - (e) Payment of Kshs 111,300 to the Kenya Institute of Special Education to cover petitioner's fees and accommodation in the institute.
33. The respondent argued that it treated the petitioner fairly and gratuitously through the 3 years ordeal and as such, the suit should be dismissed with costs.

Issues for Determination

34. It is not disputed that the respondent dismissed the petitioner from employment on medical grounds. The issues for determination are:-
 - (a) Whether the reason for the termination was valid and fair.
 - (b) Whether the procedure followed was fair
 - (c) Whether the termination violated the petitioner's right to non-discrimination, fair labour practices and fair administrative action.
 - (d) Whether the reliefs sought should be granted.



Reason for the Termination

35. Section 45 of the [Employment Act](#) bars an employer from terminating his employee's contract of service without valid and fair reason, related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements.
36. In this case, the termination was on medical grounds. The termination letter dated May 19, 2017 cited the reason for the termination as follows:-
- “In light of the foregoing and having carefully considered the representations made by yourself and on your behalf at the meeting on March 23, 2017 and all other relevant factors as outlined above, the company has decided to proceed with the termination of our employment on medical ground due to incapacity to work with effect from May 20, 2017.”
37. The petitioner contends that the employer dismissed her without providing her with reasonable accommodation to enable her continue working. The employer contends on the other hand that it gave the petitioner the necessary support by meeting her costs of treatment, costs of training and even gave her fully paid sick leave beyond the statutory entitlement
38. The respondent further contends that no doctor presented any medical report showing that the petitioner was capable of performing her duties. It also contends that the petitioner was not capable of performing her duties as a secretary and she did not show that her literacy in Braille and assistive technology could enable her to perform the duties.
39. It further contends that even after allocating the petitioner duties in the stores that did not help matters because there was ever present danger of work related injuries from accidental falling or bumping into objects and moving trucks. It mentioned an incident where she accidentally fell down leading to many days sick off to protect her from further injuries.
40. I have carefully considered the contentions by both sides. I am persuaded by the saying that disability is not inability. It follows that, disability per se alone does not translate to incapacity to perform employment duties. Therefore, when an employer cites disability as the reason for dismissing his employee, he must prove that the employee lacks capacity to perform his /or her duties. The foregoing view is grounded on section 43(2) of the [Employment Act](#) which defines reason for termination that:
- “...the matters that the employer at the time of termination of contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.
41. The said view is further fortified by section 46(g) of the [Act](#) which provide that the following does not constitute fair reason for dismissal or imposition of disciplinary penalty:
- “(g) An employee's race, color, tribe, sex, religion, political opinion or affiliation, national extraction, Nationality, social origin, marital status, HIV status or disability”. [Emphasis added]
42. In this case, it is clear that the claimant was dismissed for alleged incapacity due to her visual disability. It is also clear that before the dismissal the petitioner had undertaken training on the use of Braille and the white cane. The burden shifted to the employer to prove that it provided the petitioner with reasonable accommodation and failed to perform her duties, or that the facilities required to accommodate the petitioner could not reasonably be expected to be provided by it.



43. The foregoing is in line with the provision of section 15(2) of the *PWD Act* which provides that, an employer shall not be deemed to have discriminated a person with disability if the special facilities or modifications, whether physical, administrative or otherwise, are required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.
44. In this case, the employer admitted that it never provided the petitioner with reasonable accommodation when it submitted:-
- “Your Lordship, in the instance case, had the petitioner been able to work with assistive technology without the risk of injury to herself, the employer would have accommodated her”.
45. The respondent also admitted that it transferred the petitioner to work in the main stores but she fell and got injured leading her being placed in sick leave for many days. The foregoing points to the respondent’s recklessness because the transfer was not accompanied by special facilities to accommodate the petitioner.
46. Putting all facts into consideration, I am satisfied that the respondent has failed to prove that the petitioner lacked capacity to perform her duties even if she was afforded reasonable accommodation. It also did not prove the special facilities required to accommodate the petitioner were not reasonably within its ability.
47. The truth of matter, according to the evidence on record is that the respondent failed to provide special facilities or modification as required by the law in order to accommodate the petitioner’s disability. Therefore the reason upon which the respondent terminated the petitioner’s employment contract was not valid and fair within the meaning of section 45 and 46 of the Employment Act.

Procedure Followed

48. Under section 46 of the *Employment Act*, termination for any of the reasons set out thereunder including disability is automatically unfair. However in any other case termination is unfair within the meaning of section 45 of the Act if the termination is not done in accordance with a fair procedure.
49. The procedure followed is fair if the employee is accorded a fair hearing as set out by section 41(1) of the *Act* which provides that:-
- “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.”
50. The respondent contended that it held several meetings with the petitioner to discuss her medical conditions and recommendations by the doctors before a decision to terminate her services was reached on May 19, 2017. The petitioner admitted that the employer held a meeting with her and her presentative as well as other company officials to discuss the contents of the termination notice dated 23/3/2018 where she requested to retain her employment. To that extent I find and hold that a fair procedure was followed before terminating the petitioner’s employment contract as required by section 41 and 45 of the Employment Act.



Rights Violation

51. The reason for terminating petitioner's employment contract was her visual impairment. The respondent admits that it terminated the petitioner's employment after she lost her eyesight and after it could not guarantee her safety at the work place.
52. However, as already observed above, the respondent did nothing to accommodate the petitioner in the company. When it learned that the petitioner had lost her eyesight, it never provided any special facilities for her or modified her work environment to reasonably accommodate her new life without eyesight. Instead, it kept the petitioner inperennial sick off even after she had undertaken special education and received a certificate of capacity to continue working.
53. The termination of the petitioner's services was by all means unjustified and discriminatory contrary to article 27 of the Constitution section 5 of the Employment Act and section 15 of the PWD Act. It is now trite that the employers' duty to accommodate person with disability springs from the overriding obligation not to discriminate. It follows that every employer has a legal obligation to accommodate such employees to ensure that they remain in employment.
54. In Simon Gitau Gichuru case *supra*, the Supreme Court of Kenya held that meeting costs of treatment and continued payment of salary when the employee is away does not absolve the employer from liability for indirect discrimination. In my view therefore, what matters is whether after the said treatment the employer provided special facilities or modification of the existing facilities to reasonably accommodate the person with disability so as to enable him/her to continue working.
55. If the employer choses to terminate without such accommodation then it is immaterial how much money was paid to the employee as treatment cost and salary during the period of treatment. Liability for discrimination will accrue in favour of the employee under section 5 of the Employment Act and section 15 of the PWD Act. The termination herein was also an affront to petitioner's right to fair labour practices and fair administrative action.

Reliefs

56. In view of the finding that the termination of the petitioner's employment on medical grounds was for no valid and fair reason, I make declaration that the termination was unfair and discriminatory. I further declare that the termination contravened article 27, 41 and 47 of the Constitution and also section 5 of the Employment Act and section 15 of the PWD Act.
57. In view of the foregoing matters, I also find that the petitioner is entitled to two months' salary in lieu of notice and 10 months gross salary as compensation for the unfair termination. In making the above award, I have considered that 3 years have lapsed since the termination and therefore under section 12 of the Employment and Labour Relations Court Act, the court cannot reinstate an employee after 3 years from the date of separation. I have also considered that the petitioner worked for the respondent for over ten years and she did not cause her termination by misconduct.
58. The petitioner did not plead the salary she was drawing at the time of the termination nor was it mentioned in the evidence or submissions. The petitioner only pleaded the starting salary being Kshs 13000 which I will use to assess the damages awarded above.
59. I further award the petitioner Kshs 2,000,000 as general damages for discrimination guided by the Supreme Court decision in Simon Gitau Gichuru case *supra*, whether court reduced an award of Kshs 5,000,000 to Kshs 2,000,000 in a Judgment delivered on October 22, 2021.



Disposition

60. I have found that the termination of the petitioner's employment by the respondent on medical ground was unfair because the reason for the termination was not valid and fair. I have further found that the termination was done without first providing the petitioner with reasonable accommodation with a view to enabling her to continue working and as such, the termination amounted to discrimination and violation of her right to fair labour practices and fair administrative action. Finally, I have found that the petitioner is entitled to the reliefs sought.
61. Consequently, enter judgment for the petitioner in the following terms
- (a) Notice Kshs 26,000
 - (b) Compensation Kshs 130,000
 - (c) General damages Kshs 2,000,000
- Total Kshs 2,156,000
62. The award is subject statutory deductions but the petitioner is awarded costs plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF MARCH, 2022.

ONESMUS N MAKAU

JUDGE

