JMM v Smollan Kenya Limited (Cause 104 of 2017)
[2019] KEELRC 1905 (KLR) (29 March 2019) (Judgment)

Juliet Mwongeli Muema v Smollan Kenya Limited [2019] eKLR

Neutral citation: [2019] KEELRC 1905 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 104 OF 2017

B ONGAYA, J

MARCH 29, 2019

BETWEEN

JMM ..... CLAIMANT

AND

SMOLLAN KENYA LIMITED ..... RESPONDENT

An employer is obligated to accord an employee with disabilities reasonable accommodation to enable them effectively execute their duties.

The gist of the decision revolved around workplace treatment of persons with disabilities. The court found that an employer was obligated to accord an employees with disabilities reasonable accommodation to enable them effectively execute their duties. It held that the failure by the employer to accord an employee with disabilities reasonable accommodation amounted to discrimination contrary to section 5(2) of the Employment Act, 2007 and a violation of that employee's right to fair labour practice under article 41 of the Constitution. The court awarded the claimant Kshs 1, 500, 000.00 for discrimination and denial of equal opportunity in employment occasioned by the denial to reasonable accommodation during her employment.

Reported by Moses Rotich

Labour Law *- unfair termination of employment - termination of fixed employment contracts - where a fixed term contract of employment provided that one shall retire from the services of the employer at the end of the month in which one attained the age of sixty years - whether the refusal to renew such contract amounted to unfair termination of employment.*

Labour law *- fair labour practices – employment rights of employees with disabilities - meaning and scope of reasonable accommodation or adaptations to work environment for employees with disabilities - whether an employer was obligated to accord an employee with disabilities reasonable accommodation/modifications or adaptations to work environment - whether failure to accord an employee with disabilities reasonable accommodation amounted to discrimination - Constitution of Kenya, 2010, articles 28 & 41; Employment Act, 2007, section 5.*

Brief facts

The claimant, who was a person with disability, was employed by the respondent as a Merchandiser. The claimant initiated discussions on her reasonable accommodation for installation of SR software and use of headphones to achieve confidentiality. The respondent subsequently introduced the Hand Held Terminal (HHT) operating on touch screen technology to assist Merchandisers in their job. The claimant was also moved Merchandiser M2 to Assistant Merchandiser M1 position. In view of the visual disability, the claimant immediately informed her immediate supervisor to install a Screen Reading (SR) software and she was advised that the supervisor would inform the field manager about her needs. However, the field supervisor declined to install the software citing financial and confidentiality issues. The claimant stated that about three months later she was verbally informed by the human resource manager that her services had been terminated.

On their part, the respondents averred that they did not discriminate against the claimant on account of disability and the moving of the claimant from Merchandiser M2 to Assistant Merchandiser M1 position was not a demotion as the claimant was still getting the same salary and the job description was similar and a good fit for her as it did not involve the use of HHT and therefore the visual impairment could not be a hindrance in carrying on with her duties. Further, the claimant's contract was a 12 months' fixed contract and the same expired on August 1, 2016 and was not renewed and therefore the claimant could not be heard to say that she was unlawfully terminated.

Issues

i. Whether the claimant was unfairly terminated from employment.
ii. What was the meaning and scope of reasonable accommodation or adaptations to work environment for employees with disabilities?
iii. Whether an employer was obligated to accord an employee with disabilities reasonable accommodation/ modifications or adaptations to work environment.
iv. Whether failure to accord an employee with disabilities reasonable accommodation amounted to discrimination under section 5 of the Employment Act, 2007?

Held

1. The claimant's contract was lapsing on or about July 31, 2016. Thus, as at the time the claimant reported back to work from her maternity leave sometimes in August 2016, the 12 months' fixed term contract had lapsed on or about July 31, 2016. The contract was silent on the renewal of the contract of service except by stating at clause 2.4 that in keeping with the established practice, one shall retire from the services of the company at the end of the month in which one attained the age of sixty years. That clause only applied to the fixed term contract where the term was ending upon attainment of 60 years of age but did not entitle the employee to a renewal of every fixed term annual contracts until 60 years of age. The claimant was serving a one year fixed term contract and which lapsed as had been agreed.
2. The parties never agreed upon the terms and conditions for renewal or extension of the ending one year contract. Thus, upon purporting to report at work in August 2016, the claimant may have had mere hope or aspiration that the contract would be renewed or extended as it had already lapsed and there was no legitimate expectation evolving from the ending contract of service that the same would be renewed or extended. Thus, as the claimant purported to resume duty in August 2016, there was no subsisting contract of service she would be terminated from. The contract of service between the parties lapsed by effluxion of time on July 31, 2016 and there was no unfair termination of the contract as urged for the claimant.
3. The respondent acted within the law when it advised the claimant to apply for a medical or sick leave and she chose to apply for early maternity leave. Pursuant to sections 29 and 30(1) of the Employment Act, 2007, the respondent acted in accordance with the provisions on sick leave and maternity leave and there was no established breach in that regard.

4. The concept of reasonable accommodation provided for an opportunity for the employee and employer to discuss modifications or adaptations to work environment so that the employee could work fully like others.
5. The respondent failed to demonstrate any hardship towards seriously considering and implementing the claimant's proposal for installation of SR software and then use of headphones towards enabling the claimant to effectively work as a Merchandiser grade M1 on equal basis with other employees who held similar position.
6. The information technology policies, procedures and employee acknowledgement at clause (j) provided that only the customer provided software were to be installed on a company provided HHT. The respondent did not challenge the claimant's evidence that other staff had installed private applications on the HHT. The reasonable accommodation the claimant had requested for would entail discussing appropriate modification or adaptation of the policy requirement but the respondent failed to be receptive in that regard.
7. Achieving reasonable accommodation would entail a modification or adaptation of the general employer's operational requirements, systems or policies and not only the adaptation of the devices, tools, equipment and other physical infrastructure of the work environment. Thus, it was not open for an employer to invoke the general employer's operational requirements, systems or policies as a ground for denying the requested reasonable accommodation without an established consideration of possible modification of such general employer's operational requirements, systems or policies, and then, without establishing a reasonable justification or hardship that would make the adaptation inimical in the circumstances of the case. The claimant was entitled to provision of the SR or VC software or headphones as was requested because no hardship in doing so was established.
8. The unilateral demotion to a reliever then to an Assistant Merchandiser was after the denial of the SR or VC software and the headphones amounted to violation of the claimant's rights. The claimant being a person with disability was denied equal opportunity in employment of the respondent contrary to section 5(2) of the Employment Act, 2007. The failure to accord the claimant reasonable accommodation amounted to discrimination under section 5 of the Act. The respondent failed to establish that the discrimination did not take place as it was the respondent's burden to prove under section 5 (6) of the Act.
9. Insofar as the denial of the reasonable accommodation as was proposed by the claimant amounted to discrimination and denial of equal opportunity as envisaged in section 5 of the Act, the claimant's right to equality and freedom from discrimination under article 27 of the Constitution and the right to fair labour practice under article 41 of the Constitution were thereby violated.
10. The claimant's reporting channels and relationship at work were downgraded. The claimant was made to work under a colleague of same rank and in work whereby the claimant had done extremely well working as a sole in-charge of the allocated store. The claimant's expectations and request to be reasonably accommodated was consistent with article 28 on the right to dignity.
11. The unfair denial of reasonable accommodation was not the direct or immediate proximate cause of the separation but may have been an indirect or inert cause of the refusal by the respondent not to renew that contract of service. While the claimant was in the service of the respondent, it was clear that she was subjected to the discrimination and denial of equal opportunity in employment.
12. As such, the award of Kshs. 1, 500, 000.00 would meet ends of justice in the instant case on account of discrimination and denial of equal opportunity in employment by denying the claimant reasonable accommodation during her employment.

Claim partly allowed.

Orders

i. *A declaration that the act of the respondent in failing, neglecting and refusing to install or provide the claimant with a screen reader, voice command or any other technology to help her overcome her disability*

and subsequently the demotion of the claimant amounted to an act of discrimination on the basis of disability and that it offended articles 10, 27, 28, 41 and 54 of the Constitution.

ii. *A declaration that the claimant's rights and guarantee for fair labour practices and reasonable working conditions under article 41 of the Constitution were thereby violated by the respondent.*

iii. *A declaration that the claimant's rights to be treated with dignity as provided for under article 28 and 54(1) of the Constitution was thereby violated by the respondent.*

iv. *A declaration that the respondent violated sections 12 and 15 of the Persons with Disabilities Act, article 5 and 27 of the Convention on the Rights of Persons with Disabilities as well as sections 5(3), and 10(5) of the Employment Act, 2007.*

v. *A declaration that the decision by the respondent vides the email dated October 21, 2015 to move the claimant to the position of a reliever and subsequently causing her to assume the position of an Assistant Merchandiser vide a text message on the November 11, 2015 amounted to a demotion which was discriminatory, unprocedural, improper, unlawful, wrongful and oppressive.*

vi. *The respondent to pay the claimant Kshs 1, 500, 000.00 for compensation on account of constitutional rights violation under articles 10, 27, 28, 41, and 54 of the Constitution of Kenya; and the respondent to pay the claimant by July 1, 2019 failing interest to be payable thereon from the date of the judgment till full payment.*

vii. *The respondent to pay the claimant's costs of the suit.*

Citations

Cases

Kenya

1. *Kariuki, Patrick Njuguna v Del Monte (K) Limited* Cause 953 of 2011; [2012] KEELRC 54 (KLR) - (Explained)
2. *Sang v Attorney General* Cause 2408 of 2012; [2014] KEELRC 752 (KLR) - (Explained)

United States

Foley v Interactive Data Corp (1998) Cal Rptr 211 - (Followed)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 10, 27, 28, 41, 47, 54 - (Interpreted)
2. Employment Act, 2007 (Act No 11 of 2007) sections 5 (2)(3); 10(5); 29; 30(1); 35; 36 - (Interpreted)
3. Persons with Disabilities Act, 2003 (Act No 14 of 2003) sections 12, 15- (Interpreted)

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. Convention on the Rights of Persons with Disabilities (CRPD), 2006 articles 5, 27

Advocates

None mentioned

JUDGMENT

1. The claimant filed the statement of claim on January 23, 2017 through John Mwariri Advocate of Kituo Cha Sheria. The claimant prayed for judgment against the respondent for:

    1) A declaration that the act of the respondent in failing, neglecting and refusing to install or provide the claimant with a screen reader, voice command or any other technology to help her overcome her disability and subsequently the demotion of the claimant amounts to an act of

discrimination on the basis of disability and that it offends articles 10, 28, 47 and 54 of the *Constitution*.

2) A declaration that the claimant's rights and guarantee for fair labour practices and reasonable working conditions under article 41 have been violated by the respondent.

3) A declaration that the claimant's rights to be treated with dignity as provided for under article 28 and 54(1) of the *Constitution* have been violated by the respondent.

4) A declaration that the respondent has violated sections 12 and 15 of the *Persons with Disabilities Act*, article 5 and 27 of the *Convention on the Rights of Persons with Disabilities* as well as sections 5(3), 10(5), 35, and 36 of the *Employment Act*.

5) A declaration that the decision by the respondent vides the email dated October 21, 2015 to move the claimant to the position of a reliever and subsequently causing her to assume the position of an Assistant Merchandiser *vide* a text message on the November 23, 2015 amounted to a demotion which was discriminatory, unprocedural, improper, unlawful, wrongful and oppressive.

6) The claimant is awarded compensation of 12 months' salaries for unprocedural unfairness at Kshs 25, 299.00 x12 making Kshs 303, 588.00.

7) An order be issued for compensation on constitutional rights violation under articles 10, 28, 41, 47 and 54 of the *Constitution of Kenya*.

8) An order be issued for exemplary and general damages.

9) The court do issue any other direction, declaration, and orders that serve the cause of justice.

10) Costs of the suit.

2. The respondent filed the memorandum of response on March 4, 2017 through Patrick Rono & Company Advocates. The respondent prayed that the memorandum of claim be dismissed with costs. The claimant filed on March 31, 2017 the reply to memorandum of response.

3. The parties are not in dispute that the respondent employed the claimant to the position of a Merchandiser as per the letter dated August 1, 2015. The employment was to commence on August 1, 2015 and the gross pay was Kshs 25, 299.00 per month.

4. It is not also in dispute that as at the time of employment, the claimant was on crutches after injuring her leg and she was allowed to take a sick leave and she resumed work in September, 2015 but her sick leg started swelling again. Thus her supervisor one Nick Kitavi, whom the claimant had worked with elsewhere as a Merchandiser, gave her a three weeks further leave for her leg to heal.

5. The claimant's case is that at the material time she suffered from low vision caused by a genetic condition known as retinitis pigmentosa and at the initial induction session at Panari on 01.08.2015 with the other new staff she was introduced to the respondent's management and other staff - and the claimant's case and evidence is that she informed the respondent about her visual disability at that induction meeting.

6. The claimant's case and evidence is that she worked with loyalty and diligence until October 2015 when the respondent introduced the Hand Held Terminal (HHT) operating on touch screen technology to assist Merchandisers in their job. In view of the visual disability, the claimant immediately informed her immediate supervisor to install a Screen Reading (SR) software and she was advised that the supervisor would inform the field manager one Antony Karanja about her needs. The claimant testified that

Antony Karanja searched the software on his personal computer and asked the claimant to avail her cell-phone for installation but when the claimant did bring the HHT for the installation, Karanja declined to install it.

7. On January 8, 2016 the claimant wrote an email to Antony Karanja thus,

> "I'm writing to follow up on the screen reader issue. You mentioned company policy on the same but I understand my colleagues have installed mobile applications and are even using HHT for personal use. My concern is why is my request being rejected yet the screen reader is a basic need to me to assist me effectively execute in the trade Kind regards. Juliet."

The claimant's email had been in reply to Antony Karanja's earlier emails. On October 21, 2015 Antony Karanja had send an email to the claimant explaining that the reason they were not pro-using the screen reader was because they could not guarantee the information will be confidential because any one within an ear shot of the HHT could easily pick up the data that was being punched; and secondly as per the policy terms on the use of the HHT they were not supposed to install any other application apart from the S-Smart, and the email had concluded, "The above is what informs the decision to have you as a reliever which still gives you the opportunity to better execute in the trade." To deal with the confidentiality issue, the evidence is that the claimant proposed to use the headphones so that the data confidentiality would be dealt with (as per claimant's email of October 23, 2015 to Antony Karanja).

8. The claimant's further case is that she then consulted the Kenya Society for the Blind and she was advised about the Voice Command (VC) which was a superior technology to Screen Reader (SR) technology. The claimant by the email of October 21, 2015 requested Antony Karanja, the field manager, to consider the option of that superior technology prior to moving the claimant to the position of a reliever. Subsequently the claimant received a text message (SMS) on November 23, 2015 asking her to report at Turskys Ongata 1 but her immediate supervisor Nick Kitavi intervened for her to take the position of Assistant Merchandiser.

9. On February 26, 2016 the claimant injured her back while lifting a box of Blue Band. When she went to hospital the doctor recommended a bed rest because the claimant was then pregnant and without the rest she was likely to lose the pregnancy. She informed her immediate supervisor, from the hospital bed and by telephone, about that turn of events. The supervisor informed her that the same would be considered as early maternity leave and paid as such. The supervisor advised she writes an email which she did on March 15, 2016 but she requested for medical leave in her email; and not maternity leave as had been advised. Three months later, she delivered and the respondent's human resource manager advised her to apply for leave without pay so that she was not considered to have absconded from duty. The claimant states that she considered that she was entitled to maternity leave and so she wrote requesting for maternity leave and not unpaid leave as was advised. Her email in that regard was not replied to by the respondent. Three months later, the claimant testified that she reported back to work expecting extension of her contract but was verbally informed by the human resource manager that her services had been terminated for reporting the respondent to Kituo Cha Sheria about the failure to install the SR or VC and later demoting her to a reliever and then Assistant Merchandiser at the reduced monthly salary of Kshs 23, 237.00.

10. The claimant's further case was that as a young mother of two minors she had been subjected to a lot of pain, mental anguish, ridicule and embarrassment from the actions of the respondent and had lost a job.

11. The respondent's case was that the respondent did not discriminate the claimant on account of disability and the moving of the claimant from Merchandiser M2 to Assistant Merchandiser M1 position was not a demotion as the claimant was still getting the same salary and the job description was

similar and a good fit for her as it did not involve the use of HHT and therefore the visual impairment could not be a hindrance in carrying on with her duties. Further the claimant's contract was a 12 months' fixed contract and the same expired on 01.08.2016 and was not renewed and therefore the claimant cannot be heard to say that she was unlawfully terminated.

12. The 1st issue for determination is whether the claimant was unfairly terminated from employment. Clause 3.1 of the contract of service dated August 1, 2015 provided thus,

> "3.1. Your employment will commence on August 1, 2015 and continue for a period of 12 months unless terminated in accordance with this contract, the applicable employment law and/or the company's human resource policies."

The court returns that the contract was therefore lapsing on or about July 31, 2016. The claimant's evidence is that she gave birth in May 2016 and she forwarded all her documents to the respondent. Three months later she reported to work. Throughout the period prior to reporting back to work she had been paid fully as Assistant Merchandiser. When she reported back (which the court finds to have been sometimes in August 2016 by her own testimony) the human resource manager asked her why she had reported the issue of SR software to Kituo Cha Sheria. She replied that it was necessary for her work. The human resource manager then told her that in view of her report to Kituo Cha Sheria, she stood terminated.

13. First, the court finds that as at the time the claimant says she reported back to work sometimes in August 2016, the 12 months' fixed term contract had lapsed on or about 31.07.2016 and the claimant had been fully paid as an Assistant Merchandiser for the entire period in issue. The contract was silent on the renewal of the contract of service except by stating thus,

> "2.4. In keeping with the established practice, you shall retire from the services of the Company at the end of the month in which you attain the age of sixty years (60)."

The court returns that the clause only applied to the fixed term contract where the term was ending upon attainment of 60 years of age but did not entitle the employee to a renewal of every fixed term annual contracts until 60 years of age. The court returns that it was clear that the claimant was serving a one year fixed term contract and which lapsed as had been agreed.

14. The respondent's evidence was that the claimant took leave and she was to report back from maternity leave on June 16, 2016. She did not report back and when the respondent contacted her, she explained that her baby was then only 1.5 months old yet her 3 months' maternity leave had lapsed. Further she made no proposal to have her contract renewed or extended. The respondent's witness (RW) testified that it was after the contract had lapsed that the claimant came back to work. It was after the contract had lapsed on July 31, 2016 that she reported back. She had alleged that she had a CS at delivery but she provided no doctor's report.

15. The court returns that the evidence is clear that the claimant purported to resume duty after July 31, 2016 and long after the lapsing of the 12 months' fixed term contract. Further, the court returns that the parties never agreed upon the terms and conditions for renewal or extension of the ending one year contract. Thus, in the opinion of the court, upon purporting to report at work in August 2016, the claimant may have had mere hope or aspiration that the contract would be renewed or extended as it had already lapsed and there was no legitimate expectation evolving from the ending contract of service that the same would be renewed or extended. Thus the court finds that as the claimant purported to resume duty in August 2016, there was no subsisting contract of service she would be terminated from and the court will therefore not delve into the issues of procedural and substantive fairness of the alleged termination. The court returns that the contract of service between the parties lapsed by

effluxion of time on 31.07.2016 and there was no unfair termination of the contract as urged for the claimant. The court further finds that the prayer for compensation in that regard will fail.

16. While making that finding the court returns that the respondent acted within the law when it advised the claimant to apply for a medical or sick leave and she chose to apply for early maternity leave. In particular, section 30(1) of the *Employment Act, 2007* provides that after 2 consecutive months of service with an employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of 7 days with half pay, in each period of 12 consecutive months of service subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre. Further section 29 of the *Act* entitled the claimant to three months maternity leave and the court holds that in absence of an agreement between the parties to a contract of service, a maternity leave cannot subsist beyond the tenure of the contract of service. The court considers that the respondent acted in accordance with the provisions on sick leave and maternity leave and there was no established breach in that regard.

17. The 2nd issue for determination is whether the claimant was discriminated against on account of disability when the respondent failed to install the SR and then the VC software on the HHT that was crucial for the claimant's performance and then subsequently emplacing her as a reliever then as an Assistant Merchandiser.

18. The claimant's 2nd witness (CW2) was Lawrence M Mute a lecturer at the School of Law of the University of Nairobi where he teaches equality law, disability rights law and human rights law. He is also a member of the *African Commission on Human and Peoples' Rights* (ACHPR), a position he was elected to in 2013. He has researched and undertaken policy work on issues of disability for nearly 20 years. He served as a member of the Kenya National Commission on human Rights (2003 -2013) and played key roles as a member of the delegation of Kenya which negotiated the *Convention on the Rights of Persons with Disabilities* (CRPD) and more recently he led the process of preparing an African disability rights protocol on behalf of ACHPR.

19. In CW2's opinion, the issue in dispute in the present case is whether the respondent accorded the claimant reasonable accommodation in the circumstances of the case. In CW2's opinion, the claimant requested for SR software as an accommodation to enable her to fulfil her duties on an equal basis with her colleagues. Her request was declined on account of furtherance of confidentiality and the claimant made a further request to accommodate her by using headphones and later the VC software as was request by the claimant. CW2's evidence was that the claimant went out of her way to satisfy the respondent's confidentiality concerns and in CW2's evidence and opinion, the requested accommodations did not amount to an undue burden since they would not cost the respondent to any extent at all.

20. CW2's expert evidence was that an employee with disability may find it necessary that certain modifications are made to environment at work so that the employee can work on equal basis. Thus the concept of reasonable accommodation provides for an opportunity for the employee and employer to discuss modifications or adaptations to work environment so that the employee can work fully like others. CW2's evidence was that the claimant being a person with visual disability was therefore acting properly by beginning to discuss with her employer adaptations that could be put in place for her to be more effective and further, one of the conditions for reasonable accommodation to apply is negotiation on case to case basis between the employer and the affected employee. CW2's further evidence was that what is agreed upon should not cause undue hardship to the employer. CW2 stated that looking at the facts of the present case, what the claimant was requesting for could not have caused the respondent undue hardship because the request would not have resulted in the respondent's investment of a lot

of money. In CW2's assessment, the claimant's requests were classic opening moves by an employee who wished to engage the employer about reasonable accommodation – she disclosed that she was a person with a visual disability and certain software could facilitate her to be more effective employee. CW2's evidence was that the respondent as the employer was expected to engage and have a discussion. Thus the claimant then proposed a SR software and then a VC software, and then proposed using headphones to achieve confidentiality as desired by the respondent.

21. CW2 also testified that he was a user of the kind of technology the claimant was requesting from the respondent. About the technology, CW2 explained as follows:

    a) The SR software is used on case to case basis depending on whether the user is totally blind or partially blind. The software reads whatever is on the screen and CW2 demonstrated the same by scrolling on his phone in court. The other software is the screen magnifying software for a user who is partially blind. It makes the screen details bigger enabling the user to see them.

    b) The VC software is used by the person who is totally blind and the user commands by way of instructing the hardware (like a cell-phone or laptop) to do things. CW illustrated the same by instructing his cell-phone to take a picture and the relevant application opened to take the picture.

    c) CW2 confirmed that there were very many types of hardware and software for use by blind users or visually impaired users and some was available online free of charge while others, due to the nature of technology, will need to be bought.

22. CW2 testified that his understanding was that at the point when an employee is hired and an employee indicates they have a disability, then, discussions on adaptations and modifications can commence but since a disability does not happen at one point in life, the discussion is a continuing process with the concerned employee. Further, the law does not require that a person may not be hired because of a disability. Thus once a disability is disclosed, then, the question for employer and employee is how they can ensure the employee does the job in a manner that is beneficial to the employee and the employer – what reasonable accommodation should be put in place in that regard?

23. As a user of the technology CW2 confirmed that in private environment he uses the SR with speakers on for his comfort but in public spaces he uses headphones and the laptop had the JAWS – "Job Access With Speech", ensuring that no one else listens to what the user is listening to. Thus request of headphones by the claimant was another classic example of the employee seeking to discuss with the employer the options for reasonable accommodation – that no one would hear whatever she was transacting and therefore meet the confidentiality required.

24. CW2 further stated that it was unlikely that the claimant asked for Braille because Braille is generally not available to those who acquire blindness in adulthood as the claimant was visually impaired through the degenerative condition. CW2 testified that he would be surprised that the claimant asked for special Braille.

25. CW2 testified that looking at the provisions of articles 5 and 2 of *CRPD* and Kenya being a party thereto, it was clear that reasonable accommodation is a necessary component of discrimination so that when it was not provided, it may amount to discrimination. Further when the respondent moved the claimant to a reliever, she was thereby disadvantaged because a reliever would then work only when the in-post is not at work. Further, if the movement to Assistant Merchandiser led to reduction in pay, then the same was unfair because whereas moving the employee may well be consistent with reasonable accommodation, the movement should not be at the disadvantage of or adverse to the employee in terms of pay and other benefits the employee may have already been enjoying.

26. The respondent's witness (RW) testified that the claimant was employed as a Merchandiser to be in – charge of a goods' store to be allocated and with the duties of ensuring that the products are cleaned, well displayed, are available, and making orders to replenish the stocks. The claimant performed her duties satisfactorily. RW stated that the claimant had been discussing with her supervisor and manager about use of HHT and RW testified that if the claimant had to handle a store alone then she needed to use the HHT but if they were 2 then she did not need to use HHT. RW confirmed that the claimant was in-charge of a store so that she needed to use the HHT. RW further confirmed that she was moved from a Merchandiser grade M1 to Assistant Merchandiser M2 but nothing much changed. Further the movement was because the claimant was unable to use the HHT so she was to work with another person to ease her work. RW testified that the respondent would need to customise the device for the claimant to be able to use the HHT and the cost was a bar or prohibitive because a special phone would be required to install the SR software that the claimant had proposed. Thus RW testified that M2 meant someone else assisting the claimant to work using HHT but her responsibilities did not change and the same salary was paid. RW had no documented evidence of moving the claimant from M1 to M2 and no written evidence of moving her to another store. RW was the human resource officer and the decision to move the claimant to a reliever by the field manager was never conveyed to RW. RW stated that the claimant was moved verbally from one store to another. Further the HHT devise had been introduced in August 2015 and given to the claimant in October 2015 when she resumed work after her leg had healed. RW confirmed that assignment of relievers was verbal.

27. The court has considered the evidence, the pleadings, and the submissions and makes findings as follows:

    1) The claimant was employed as a Merchandiser grade M1 and moved to a reliever (per email of October 21, 2015 by Antony Karanja) and then Assistant Merchandiser grade M2 (at Tusky's Ongata 1 where she deputised another merchandiser). The movement was by oral decisions and the court returns that the movement was adverse to the claimant because as a reliever she'd not work regularly and as Assistant Merchandiser grade M2 her salary was reduced. Under section 10(5) of the Employment Act, 2007, the variation in the designation required the respondent to consult the claimant and the change to be conveyed to the claimant in writing but that was not done. The exhibited payslips show that the total earning for October 2015 was Kshs 24, 831.82 and for November (after the move to M2) was Kshs 23, 964.00 as submitted for the claimant. The court further finds that as an Assistant Merchandiser the claimant's reporting channels were downgraded from reporting to a supervisor to reporting to a fellow Merchandiser.

    2) There is no doubt that the claimant was a person with disability and she exhibited her National Council for Persons with Disabilities card registration number NCPWD/P/XXXXXX and the disability was "visual' issued on June 12, 2015. The claimant initiated discussions on her reasonable accommodation for installation of SR software and use of headphones to achieve confidentiality. Throughout that discussion and relevant correspondence the respondent never raised financial hardship towards implementing the claimant's proposal. Further the alleged financial hardship to such implementation was merely alleged before the court but was not demonstrated at all. The evidence was that the field manager managed to download the SR software on his laptop but then declined to install it for use by the claimant. That evidence shows that there would be no significant financial constraints or hardship in the respondent's undertaking of the accommodation as had been requested or proposed by the claimant. The court returns that the respondent has failed to demonstrate any hardship towards seriously considering and implementing the claimant's proposal for installation of SR software and then

use of headphones towards enabling the claimant to effectively work as a Merchandiser grade M1 on equal basis with other employees who held similar position.

3) The information technology policies, procedures and employee acknowledgement at clause (j) provided that only the customer provided software are installed on a company provided HHT. The respondent did not challenge the claimant's evidence that other staff had installed private applications on the HHT and the court further finds that the reasonable accommodation the claimant had requested for would entail discussing appropriate modification or adaptation of the policy requirement but the respondent failed to be receptive in that regard. In the court's opinion, achieving reasonable accommodation would entail a modification or adaptation of the general employer's operational requirements, systems or policies and not only the adaptation of the devices, tools, equipments and other physical infrastructure of the work environment. Thus the court returns that it is not open for an employer to invoke the general employer's operational requirements, systems or policies as a ground for denying the requested reasonable accommodation without an established consideration of possible modification of such general employer's operational requirements, systems or policies, and then, without establishing a reasonable justification or hardship that would make the adaptation inimical in the circumstances of the case.

4) As submitted for the claimant she was entitled to provision of the SR or VC software or headphones as was requested because no hardship to do so was established and article 54 (1) of the *Constitution* provides thus,

> "A person with any disability is entitled –
>
> (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
>
> (e) to access materials and devices to overcome constraints arising from the person's disability."

The court finds that the unilateral demotion to a reliever then to an Assistant Merchandiser was after the denial of the SR or VC software and the headphones amounted to violation of the article as cited and as submitted for the claimant. The court further finds that the claimant being a person with disability was denied equal opportunity in employment of the respondent contrary to section 5(2) of the *Employment Act, 2007*. The failure to accord the claimant reasonable accommodation amounted to discrimination under section 5 of the Act and the court returns that the respondent failed to establish that the discrimination did not take place as it was the respondent's burden to prove under section 5 (6) of the *Act*. In so far as the denial of the reasonable accommodation as was proposed by the claimant amounted to discrimination and denial of equal opportunity as envisaged in section 5 of the Act, the claimant's right to equality and freedom from discrimination under article 27 of the *Constitution* and the right to fair labour practice under article 41 of the *Constitution* were thereby violated.

5) As for the remedy for the discrimination, it was submitted that the claimant should be awarded Kshs 3,000, 000.00. It was submitted for the claimant that in *Antony Kipkorir Sang v Attorney General* [2014]eKLR the claimant's rights in article 27, 28 and 54 were found to have been violated by retiring the petitioner on medical grounds without taking into account the possibility of reasonable accommodation and section 15(6) of the *Persons with Disabilities Act* had been violated before prescribing the retirement. For the respondent it was submitted that clause 2.2 of the contract of service was clear that the claimant could serve in a capacity

and places other than specified in the letter of appointment provided in such event, the terms of service would not be less favourable than those that applied in the letter of appointment. The respondent submitted that the movement from M1 to M2 was within jobs that were substantially similar. The court finds that as per the claimant's evidence, after the movement in designation, her salary did not remain the same but it started to fluctuate. The claimant's injury was captured in her evidence thus,

> "After HHT arrived I was demoted. The movement affected me emotionally as humiliating. I was to be an assistant rather than the sole Merchandiser. I did not report directly. Tuskys ChapChap I ran it alone. Now at Tuskys One I was under a Merchandiser..."

As submitted for the claimant, it was not just about the rank or salary but also the inherent satisfaction and dignity the employee draws from employment. In the instant case it was clear that the claimant's reporting channels and relationship at work were downgraded. The claimant was made to work under a colleague of same rank and in work whereby the claimant had done extremely well working as a sole in-charge of the allocated store. The claimant's expectations and request to be reasonably accommodated was consistent with article 28 on the right to dignity. Further the court follows the opinion in *Foley v Interactive Data Corp* (1998) Cal. Rptr. 211 cited for the claimant and where it was held that a man or woman usually does not enter into employment solely for the money; a job is status, reputation, a way of defining one's self worth and worth in a community. In the ruling in *Patrick Njuguna Kariuki v Del Monte (K) Ltd* [2012]eKLR, this court stated,

> "The court is of the opinion that every moment of time that an employee works inherently generates satisfaction and the employee's self esteem which is a necessary component to the employee's human dignity beyond the mere pay for the employee's work."

6) The court has considered that in *Antony Kipkorir Sang v Attorney General* [2014]eKLR the Kshs 3, 000, 000.00 was awarded in circumstances whereby the claimant had lost employment by way of retirement on medical grounds and reasonable accommodation had been denied in that regard. In the instant case the court has considered that the unfair denial of reasonable accommodation was not the direct or immediate proximate cause of the separation but may have been an indirect or inert cause of the refusal by the respondent not to renew that contract of service. While the claimant was in the service of the respondent, it is clear that she was subjected to the discrimination and denial of equal opportunity in employment as found by the court in this judgment. The court considers that the award of Kshs 1, 500, 000.00 will meet ends of justice in this case on account of discrimination and denial of equal opportunity in employment by denying the claimant reasonable accommodation during her employment.

7) The court return that the claimant has succeeded as found and is awarded costs of the suit.

28. In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the act of the respondent in failing, neglecting and refusing to install or provide the claimant with a screen reader, voice command or any other technology to help her overcome her disability and subsequently the demotion of the claimant amounted to an act of discrimination on the basis of disability and that it offended articles 10, 27, 28, 41 and 54 of the *Constitution*.

2) The declaration that the claimant's rights and guarantee for fair labour practices and reasonable working conditions under article 41 were thereby violated by the respondent.

3) The declaration that the claimant's rights to be treated with dignity as provided for under article 28 and 54(1) of the *Constitution* was thereby violated by the respondent.

4) The declaration that the respondent violated sections 12 and 15 of the *Persons with Disabilities Act*, article 5 and 27 of the *Convention on the Rights of Persons with Disabilities* as well as sections 5(3), and 10(5) of the *Employment Act, 2007*.

5) The declaration that the decision by the respondent vides the email dated October 21, 2015 to move the claimant to the position of a reliever and subsequently causing her to assume the position of an Assistant Merchandiser vide a text message on the November 23, 2015 amounted to a demotion which was discriminatory, unprocedural, improper, unlawful, wrongful and oppressive.

6) The respondent to pay the claimant Kshs 1, 500, 000.00 for compensation on account of constitutional rights violation under articles 10, 27, 28, 41, and 54 of the *Constitution of Kenya*; and the respondent to pay the claimant by July 1, 2019 failing interest to be payable thereon from the date of this judgment till full payment.

7) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED IN COURT AT NAIROBI THIS FRIDAY 29TH MARCH, 2019.

BYRAM ONGAYA

JUDGE