Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KESC 12 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 36 OF 2019

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

OCTOBER 22, 2021

BETWEEN

SIMON GITAU GICHURU ..... APPELLANT

AND

PACKAGE INSURANCE BROKERS LTD ..... RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal sitting at Nairobi (Waki, Makhandia, & Sichale, JJA) delivered on the 19th day of July 2019 in Civil Appeal No. 307 of 2018)

Factors that courts should consider in claims of indirect discrimination at the workplace

The Supreme Court of Kenya heard an appeal challenging a Court of Appeal decision regarding the termination of the appellant's employment. The appellant had been terminated on grounds of gross misconduct. The Supreme Court found that the Court of Appeal failed to properly analyze evidence and introduced new facts. Ultimately, the Supreme Court partially allowed the appeal, set aside the Court of Appeal's judgment, and reinstated the trial court's award of 12 months' salary for unfair dismissal. The Supreme Court also awarded costs to the appellant.

Reported by Ribia John

Constitutional Law *– fundamental rights and freedoms – equality and freedom from discrimination – discrimination – types of discrimination – direct discrimination vis-à-vis indirect discrimination - what was the difference between direct discrimination and indirect discrimination - what were the elements of direct discrimination - what were the elements of indirect discrimination – Constitution of Kenya, 2010 article 27.*

Labour Law *– employment - dismissal – dismissal on grounds of incapacity – obligations on the employer – justification of dismissal on grounds of incapacity - duty to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal – whether an employer had a duty to investigate the extent of incapacity or injury and the alternatives short of dismissal before dismissing an employee on grounds of incapacity.*

Labour Law *– employment – dismissal – dismissal on grounds of gross misconduct – duty by employer to grant employee an opportunity to respond to allegations – where a contractual provision required no prior notice when terminating an employee on grounds of misconduct - whether the provisions in an employment contract*

that required no prior notice when terminating an employment contract due to gross misconduct could oust the statutory requirement to grant the employee the opportunity to defend him/herself or to respond to the allegations – Employment Act (cap 226) sections 41 and 45(2)(c).

Labour Law *– employment – dismissal – summary dismissal – duty on an employer to grant an employee a hearing before dismissal - whether summary dismissal gave an employer a blanket right to dismiss an employee at will without a hearing - Employment Act (cap 226) sections 41, 44(4) and 45(2)(c).*

Labour Law *– employment – dismissal – unfair dismissal – remedies for unfair dismissal – award of damages - purpose of award of damages in a claim of discrimination against an employee – what did the court consider in awarding damages.*

Evidence Law *– burden of proof – burden of proof in claims of discrimination by an employee against an employer – requirement by an employer to give reasons for the actions taken against an employee - whether the obligation set on an employer, alleged to have engaged in a discriminatory practice, to give reasons for taking certain actions against the employee shifted the burden of proof from the employee to the employer – when did the burden of proof in a claim of discrimination against an employer shift from the employee to the employer – Evidence Act (cap 80) sections 108 and109; Employment Act, No. 11 of 2017, section 5(7).*

Words and phrases *– discrimination – definition of discrimination - failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured - Black's Law Dictionary, 10th Edition.*

Brief facts

The appellant was employed by the respondent on a permanent and pensionable basis as the operations manager. The appellant was diagnosed with a tumour upon which his doctor recommended that he seeks medical attention in India. The appellant proceeded to India for a spinal cord surgery where he underwent successful treatment until January 17, 2014 during which period he continued to receive his full salary.

In the course of duty, the respondent became overly concerned with the appellant's health condition while in office. They noted that the appellant was unable to move around unaided. They requested the appellant to proceed on sick leave until such time when he would be able to move around the office unaided and asked for a medical appraisal of the appellant's condition in confidence from his medical consultant. The appellant provided the medical report late. As a consequence of the belated medical report, the respondent suspended the appellant and later summarily dismissed the appellant for gross incompetence because of improprieties that arose when the respondent conducted an audit on the appellant's accounts that revealed a cover up for non-performing accounts contrary to the company's policy and that the appellant had failed to reconcile underwriter accounts in clear violation of his employment contract.

Aggrieved the appellant filed a suit at the Employment and Labour Relations Court (trial court) for unlawful and wrongful termination and for discrimination. The trial court held that the appellant was discriminated against and terminated without being given a chance to be heard. He was awarded Kshs. 5,000,000 as damages for discrimination, 12 months' salary as compensation for unlawful and unfair termination and one month's salary *in lieu* of notice.

Aggrieved the respondent filed an appeal at the Court of Appeal on grounds that the trial court erred in law and fact in finding that they had discriminated against the appellant and finding that they had unlawfully and unfairly terminated the appellant's employment. At the Court of Appeal, the court held that although there was no discrimination, the appellant was unfairly terminated. Aggrieved, the appellant filed the instant appeal on grounds that the Court of Appeal erred in law and fact in finding that the appellant was not discriminated against by the respondent.

Issues

i. Whether the obligation set on an employer, alleged to have engaged in a discriminatory practice, to give reasons for taking certain actions against the employee shifted the burden of proof from the employee to the employer.

ii. When did the burden of proof in a claim of discrimination against an employer shift from the employee to the employer?

iii. What was the difference between direct discrimination and indirect indiscrimination?

   1. What were the elements of direct discrimination?
   2. What were the elements of indirect discrimination?

iv. What requirements was an employer to fulfill to justify dismissal on grounds of incapacity?

v. Whether an employer had a duty to investigate the extent of an employee's incapacity or injury and the alternatives available short of dismissal before dismissing an employee on grounds of incapacity.

vi. Whether the provisions in an employment contract that required no prior notice when terminating an employee due to gross misconduct could oust the statutory requirement to grant the employee an opportunity to defend himself/herself or to respond to the allegations.

vii. Whether summary dismissal as contemplated under section 44(4) of the Employment Act gave an employer a blanket right to dismiss an employee at will without a hearing.

viii. What was the purpose of the remedy of an award of damages in a claim of discrimination against an employer?

Relevant provisions of the Law

Employment Act (cap 226)

Section 5 - Discrimination in employment

(7)In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

Section 41 - Notification and hearing before termination on grounds of misconduct

(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.

(2)Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

Section 44 - Summary dismissal

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Section 45 - Unfair termination

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

(c) that the employment was terminated in accordance with fair procedure.

Evidence Act (cap 80)

Section 108 - Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 - Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Held

1. Discrimination against any employee was provided for under article 27 of the Constitution as well as sections 5 and 47 of the Employment Act. No person should directly or indirectly discriminate against another person on account of health status or disability.
2. The protection of employees against any form of discrimination at the work place was a significant matter and the burden placed upon an employer to disprove the allegations of discrimination was enormous. The employer had to prove that discrimination did not take place as alleged and that where there was discrimination, it was not with regard to any of the specified grounds in section 5(3) of the Employment Act. That however did not automatically shift the burden of proof in cases of discrimination against an employee to the employer.
3. According to section 5(7) of the Employment Act, an employer alleged to have engaged in a discriminatory practice had to give reasons for taking certain actions against the employee. Where such actions were shown not to have any justification against the protected group, then discrimination against such an employee had to be addressed. The appellant had discharged the burden of proof and it shifted to the respondent who failed to discharge it on their part.
4. Section 108 of the Evidence Act provided that the burden of proof in a suit or procedure lay on the person who would fail if no evidence at all were given on either side. Section 109 of the Act declared that, the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of that fact would lie on any particular person. The petitioners bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden.
5. Discrimination was failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured. Not all cases of distinction amounted to discrimination. Discrimination could be said to have occurred where a person was treated differently from other persons who were in similar positions on the basis of one of the prohibited grounds like race, sex disability or due to unfair practice and without any objective and reasonable justification.
6. Direct discrimination involved treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involved setting a condition or requirement which

was a smaller proportion of those with the attribute were able to comply with, without a reasonable justification.

7. In considering claims of indirect discrimination, courts were:
    1. to identify the relevant provision, criterion or purpose, which was applicable;
    2. to determine the issue of disparate impacts, which entailed identifying a pool for the purpose of making a comparison of the relevant disadvantage;
    3. to ascertain whether the provision, criterion or practice also disadvantaged the claimant personally; and
    4. to consider whether the policy was objectively justified by a legitimate aim; and to consider (if the above requirements were satisfied) whether that was a proportionate means of achieving such a legitimate aim.
8. The salient features of indirect discrimination were that:
    1. in none of the various definitions of indirect discrimination was there any express requirement for an explanation of the reasons why a particular provision, criterion or practice put one group at a disadvantage when compared with others.
    2. The contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly required a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination did not. Instead it required a causal link between the provision criterion or practice and the particular disadvantage suffered by the group and the individual.
    3. The reasons why one group could find it harder to comply with the provision, criterion or practice than others were many and various.
    4. There was no requirement that the provision, criterion or practice in question should put every member of the group sharing the particular protected characteristic at a disadvantage.
    5. It was commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence.
    6. It was always open to the respondent to show that the provision, criterion or practice was justified.
9. The respondent's actions to terminate the appellant bordered on outright victimization. The appellant's medical report was not inconclusive. The appellant was not uncooperative in furnishing the report. Though the report was availed, albeit late, no prejudice would have been suffered by the respondent in considering the recommendations. It was the doctor's recommendation that the appellant should resume duty in two months' time subject to periodic review of the appellant's condition. Furthermore, in the respondent's letter of April 14, 2014, no specific timeline was given to the appellant to avail the report. It only stated, "as soon as possible". In that regard, the respondent's action was drastic, harsh and unwarranted in the circumstances.
10. The respondent ought to have considered the report or even to have at least conducted its own investigation as to the appellant's medical condition. 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 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. The actions by the respondent amounted to indirect discrimination due to differential treatment.
11. The burden of proving that the appellant was medically unfit to continue serving shifted to the respondent to prove the same using an expert opinion. The respondent never produced any medical

assessment to demonstrate that the appellant was not capable of performing his duties any more so by virtue of his physical incapacity. The respondent disregarded the appellant's medical report and proceeded to not only suspend him on medical grounds but eventually terminate him on grounds of gross incompetence and that was unjust and discriminatory.

12. The respondent was compassionate to the appellant by facilitating the appellant's treatment and even increasing his salary a month after he resumed work. The salary increase could not be said to have been a sympathetic act by the respondent as that 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 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. 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.
13. Section 2 of the Persons with Disabilities Act No. 14 of 2003 defined disability as a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacted adversely on social, economic or environmental participation. The Act was silent on what constituted a temporary or permanent disability. As long as the impairment impacted adversely on social, economic, or environmental participation of an individual, it was deemed to be a disability. A perusal of the record of appeal indicated that the appellant accepted his condition and took steps to register with the National Council for Persons with Disabilities as a Person with Disability (PWD) and was issued with a disability card.
14. Section 15 of the Persons with Disabilities Act No. 14 of 2003 expressly prohibited discrimination by employers. The Act went further to require employers to put in place special facilities in order to accommodate its employees with disabilities. The respondent failed to demonstrate that there was any undue hardship they would have suffered if they chose to reasonably accommodate the needs of the employee by providing amenities such as a ramp to ease the appellant's movement or even providing flexible working hours.
15. The respondent expressly admitted that they did not have the facilities to accommodate the appellant in the office. The fact that the respondent expected the appellant to continue working in the same conditions as the rest of the employees was outrightly unreasonable. The respondent arbitrarily resolved that the appellant was no longer productive by virtue of his inability to walk unaided when in fact they failed to demonstrate what steps they took to accommodate him in his state.
16. The respondent catered for the medical expenses of the appellant through the medical cover and even continued to pay his salary for the period he was away for treatment. The respondent exhibited indirect discrimination towards the appellant.
17. The issue of gross incompetence was an afterthought. The respondent's action of dismissing the appellant was extremely harsh and they had not reasonably demonstrated what measures they took to accommodate the appellant's condition.
18. The procedure followed to terminate the contract was in breach of sections 41 and 45 (2)(c) of the Employment Act because the appellant was not accorded a chance to defend himself or respond to the allegations against him. Although the letter of appointment provided for no prior notice when terminating the employment due to gross misconduct, that stipulation of the contract could not be used to oust a mandatory and express statutory provision in section 41 of the Employment Act. The failure to follow fair procedure rendered the termination of the appellant's employment unfair within the meaning of section 45 of the Act.
19. Although the Court of Appeal found that the summary dismissal was unfair, the court attributed the dismissal to the appellant's conduct. They held that the appellant's transgressions contributed to his dismissal when in fact the respondent had been lenient and compassionate to him throughout

his sickness. They only took issue with the fact that he was never afforded an opportunity to be heard. Under the Employment Act, there was no express provision for dismissal on medical grounds. However, the employer was required to demonstrate that medical assessments were conducted and that there were circumstances which rendered the employee incapable of performing. In regard to dismissal in cases of incapacity, the respondent was required to have a hearing under section 41 of the Employment Act.

20. No hearing was demonstrated to have been conducted. The dismissal was unfair and unlawful for failing to accord the appellant a fair hearing. The respondent was required to facilitate the termination in accordance with section 41(1) of the Employment Act in order to come within the ambit of fairness. The allegations that the appellant faced would have well been explained if an opportunity to respond was granted so as to avoid the harsh sanction of a summary dismissal as contemplated under section 41 of the Employment Act. Moreover, section 44(4) of the Employment Act did not give an employer a blanket right to dismiss an employee at will. However grave the circumstances of the employee's misconduct, the employee was entitled to be heard before he was dismissed.
21. The right to be heard was the cornerstone of fair labour practices. Where the circumstances did not allow a hearing before summary dismissal, the duty was upon the employer to set such out. The appellant's summary dismissal was unfair, unjust and unlawful for want of due process.
22. An award of damages should not be punitive to one party but at the same time it should act as a deterrent to employers who engaged in discriminatory acts. Employment laws in Kenya had made great strides in ensuring that employees were protected from discriminatory acts by the employer and the onus was therefore on employers to ensure that they set out proper policies to govern their engagement with employees, to avoid falling into dangers of workplace discrimination. The award of Kshs 5,000,000 was inordinately high and disproportionate. The award of 12 months' salary in compensation as awarded by the trial court was sufficient.
23. An award of damages was discretionary in nature. The Supreme Court could invoke its inherent powers to ensure that justice should not only be done but should be seen to be done to all litigants.

Appeal partly allowed.

Orders

i. *The petition of appeal dated September 2, 2019 partially succeeded.*
ii. *The judgment of the Court of Appeal dated July 19, 2019 was set aside.*
iii. *Judgement was entered in the following terms:*
    1. *Damages for discrimination - Kshs. 2,000,000*
    2. *12 months' salary in compensation - Kshs 2, 384,100*
    3. *1 Months' salary in lieu of notice - Kshs 198,675*
    4. *Salary for July 2014 - Kshs 198,675*
    5. *Total - Kshs 4,781,450*
iv. *Costs awarded to the appellant.*
v. *The amounts awarded would attract interest at court rates from the date of the trial court's judgment until payment in full.*

Citations

Cases

Kenya

1. *Dida, Mohammed Abduba v Debate Media Limited & another* Civil Appeal 238 of 2017; [2018] KECA 642 (KLR) - (Explained)
2. *Gwer & 5 others v Kenya Medical Research Institute & 3 others* Petition 12 of 2019; [2020] KESC 66 (KLR) - (Followed)
3. *Management of Motor Vehicles v Presiding Officer, ILR* [1987] KAR 507 - (Applied)

4. *Marete,DK Njagi v Teachers Service Commission* Cause 379 [N] of 2009; [2013] KEELRC 575 (KLR) - (Mentioned)
5. *Mulinge, James v Freight Wings Limited* Cause No 1359 of 2014; [2016] eKLR - (Explained)
6. *Nyarangi & 3 others v Attorney General* [2008] KLR 688 - (Followed)
7. *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No 42 of 2015; [2017] eKLR - (Explained)
8. *Outa, Fredrick Otieno v Jared Odoyo Okello & 3 others* Petition No 6 of 2014; [2017] eKLR - (Followed)
9. *Pandya Memorial Hospital v Geeta Joshi* Civil Appeal 62 of 2019; [2020] KECA 65 (KLR) - (Followed)
10. *VMK v CUEA* Cause No 1161 of 2010; [2013] eKLR - (Explained)
11. *Waga, Duncan Otieno v Attorney General* Cause 89 of 2013; [2014] KEELRC 753 - (Mentioned)
12. *Waweru, Peter K v Republic* Miscellaneous Civil Application No 118 of 2004; [2006] eKLR - (Followed)

South Africa

Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and others (2007) ZALC 94; 4 BLLR 356 ; (2008) 29 ILJ 1239 - (Followed)

United Kingdom

1. *Alexander v Home Office* [1988] 2 All ER 118 - (Mentioned)
2. *Essop & others v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27 - (Followed)
3. *Marshall v Harland and Wolff Ltd:* NIRC 1972 - (Mentioned)
4. *Sarka Angel Walkins Singh v the Governing Body of Aberdare Girls High School, & Another* [2008] EWHC 1865 - (Followed)

India

Kedar Nath v State of WB (1953) SCR 835 (843) - (Mentioned)

Canada

MacNeill v Canada (Attorney General) 1994 CanLII 3496; (1993) 64 FTR 41 - (Followed)

Texts

1. Fullinwider, RK., (Ed) (1980), *The Reverse Discrimination Controversy: A Moral and Legal Analysis* Maryland: Rowman & Littlefield Publishers p 11-12
2. Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minessota: Thomson West 10th Edn

Statutes

Kenya

1. Constitution of Kenya articles 27(4)(5); 163(4)(a) - (Interpreted)
2. Employment Act (cap 226) sections 5(7)(8); 12; 41(1); 42(1); 43(1); 44(4); 45(2)(c); 47(5) - (Interpreted)
3. Evidence Act (cap 80) section 108 - (Interpreted)
4. National Cohesion and Integration Act, 2008 (cap 7N) section 7(4)- (Interpreted)
5. Persons with Disabilities, 2025 (Act No 4 of 2025) sections 2,15 - (Interpreted)

Instruments

Discrimination (Employment and Occupation) Convention, 1958 (No 111)

Advocates

Miss Cuna for the appellant.

Mr Omotii for the respondent.

JUDGMENT

A. Introduction

1. The petition of appeal before this court is dated September 2, 2019 and filed on even date. The appellant has appealed under article 163(4)(a) of the *Constitution*, challenging the decision of the Court of Appeal (Waki, Makhandia & Sichale, JJA) delivered on July 19, 2019, in Civil Appeal No 307 of 2018. The appellant seeks this court's interpretation and application of article 27(5) of the *Constitution*.

B. Background

2. The appellant was employed by the respondent on a permanent and pensionable basis as the Operations Manager on a salary of Kshs 129,675/= per month effective January 1, 2010. Sometime in November 2013, the appellant was diagnosed with a tumor upon which his doctor recommended that he seeks medical attention in India. On November 16, 2013, the appellant proceeded to India for a spinal cord surgery where he underwent successful treatment until January 17, 2014 during which period he continued to receive his full salary. Subsequently, he resumed duty on February 10, 2014. On February 18, 2014, the respondent graciously increased his salary to Kshs 138,675 with a further Kshs 60,000 amounting to Kshs 198,675 per month. During the subsistence of his employment, he also managed to acquire two motor vehicles Registration KBJ 278P and KAN 429N through a loan facility granted by the respondent.

3. In the course of duty, the respondent became overly concerned with the appellant's health condition while in office. They noted that the appellant was unable to move around unaided. This prompted them to write a letter to the appellant on April 14, 2014 requesting him to proceed on sick leave until such time when he would be able to move around the office unaided. In the same vein, the respondent also asked for a medical appraisal of the appellant's condition in confidence from his medical consultant. The contents of the letter were as follows:

> " Dear Simon,
>
> R.E: Appraising Your Medical Condition
>
> We take this opportunity to appreciate the progress you have made in normalizing your health after the delicate spinal surgery you underwent last year. Indeed, we can only be very grateful to the Almighty God for his great mercies and his healing hand on you.Having said the above, the way forward is very important to both you and the company. We are convinced that both you and company have a role to play for your healing to be complete. In this regard, the company would like to play its role in the most effective way and therefore it has been decided that: -
>
> 1. The company does not improve your healing process by having you in the office in your current physical condition. In the circumstances and until you are able to move around the office unaided, and while you continue to attend the physiotherapy clinics, we ask that you rest at home as the office does not have suitable facilities and conditions for your easements. (sic)
>
> 2. You will appreciate that we have not been informed by any medical report or advice on the nature of your sickness to date. We therefore ask for a medical

appraisal of your current condition from your medical consultant for our information and guidance. You will please ask him to release the information to us in confidence as soon as possible. A letter addressed to the consultant is attached.

We continue interceding our Lord with prayers for your quick and complete recovery.

Yours Sincerely,

Mrs SN Mwangi

Director."

4. On May 22, 2014, the respondent wrote a further letter raising their concern that the appellant had failed to avail the medical report from his doctor as well as expressing an intention to suspend his employment. The letter stated:

" Dear Simon,

Re: Appraising Your Health Condition

Following our letter to you dated April 14, 2014 and your text message (sms) of May 14, 2014, we regret to note that this company is not any better in terms of information regarding your health. Lack of a professional advice on your condition as requested in our said letter has really inhibited our decision making.

Needlessly to state, this company has continued to pay your dues for the last 7 months despite your being off duty. In view of our lack of information about your condition, we may not predict of your condition (sic) and the future. You will appreciate that this is not normal anywhere else.

Notwithstanding the above circumstances, this company is in need of productivity. We therefore give notice that we shall have no alternative but to suspend your employment together with all accruing benefits 30 days from the date of this letter. Please be guided accordingly.

We continue to intercede our Lord with prayers for your recovery.

Yours Sincerely,

Mrs SN Mwangi

Director"

5. On May 27, 2014, Dr Kiboi Julius Githinji released the medical report upon which the appellant availed to the respondent on May 28, 2014. The said report recommended that the appellant resume duty in two months' time. The handwritten report read as follows:

"Re: Simon Gitau Gichuru

The above named (sic) has spinal cord tumor operated in India, 19th November 2013 and subsequently physiotherapy performed. He postoperatively developed paraplegia. He currently is improving remarkably with progressive physiotherapy and is now able to walk with a walking frame and with assistance. However, he still has lower limb weakness which after current review looks like will have progressive motor power improvement in two to six months. After 2 months we shall review and advice on outcome of our prognosis. I recommend that after two months he resumes his duties and work.

Kindly assist.

Dr Kiboi."

6. As a consequence of the belated medical report, the respondent, through its Managing Director, resolved to suspend the appellant from employment on medical grounds via its letter dated June 23, 2014. This letter is reproduced herein:

> " Dear Simon,
>
> Re: Suspension of Employment
>
> Further to our letter of May 22, 2014, we regret to advise that your employment with this company has been suspended with effect from the date of this letter on health grounds as earlier advised in our above quoted letter. All benefits arising out of your employment have therefore ceased from today.
>
> In the circumstances, we attach a cheque No. 001218 for Kshs 72,530/= (Seventy-Two Thousand Five Hundred and Thirty Shillings only) being your June 2014 emoluments, less your loan reductions which kindly acknowledge. In the meantime, we advise that you have outstanding liabilities with us as follows: -
>
> 1. Personal car loan Shs 212, 344.00
> 2. Commercial Vehicle Shs 883, 067.00
>
> Total Shs 1,095,411.00
>
> In terms of repayments thereof, we ask that you provide a repayment plan for the debt within the next 14 days. We advise that if we do not receive an acceptable plan within the said 14 days, we shall proceed to demand and enforce our rights under the conditions of the advances accordingly.
>
> We ask that you return to the CEO, any company property in your possession.
>
> We thank you for the dedicated service you have given this company in the past and wish you the very best in your future endeavours.
>
> Yours Sincerely,
>
> Mrs SN Mwangi
>
> Director."

7. Ostensibly, this did not augur well with the appellant as he perceived that the respondent's arbitrary suspension was in blatant disregard of his doctor's recommendation as delineated in the medical report which, according to him, amounted to constructive dismissal. Consequently, on July 7, 2014, the appellant, through his advocate, M/s Mbuthia Kinyanjui & Company Advocates wrote to the respondent challenging the suspension terming it as a termination disguised as a suspension which was unjustified, unfair and discriminatory. A notice of intention to sue was also conveyed if the respondent failed to accept liability of its actions.

8. By a letter dated July 11, 2014, the respondent denied the allegations that the appellant's suspension amounted to constructive termination. Following the series of events that ensued, the respondent, on August 1, 2014, officially summarily dismissed the appellant for gross incompetence. It emerged that the respondent had carried out in-depth investigations which led to the discovery that the appellant

had invited brokers who had pending issues to renew their policies. He also allegedly covered up for non-performing accounts contrary to company policy and that he had failed to reconcile underwriter accounts in clear violation of his employment contract. The termination letter reads as follows:

> " Dear Simon,
>
> RE: Termination of Contract of Employment
>
> Following a review of your performance while in employment and our clients' complaints, we have carried out an in-depth investigation of customer's (sic) accounts, you did not act in the company's interests. As a result, the company has lost money with some of the customers alleging that they paid their debts albeit through yourself. We are further satisfied that in your supervisory role, you continuously asked the brokers in charge of the accounts to renew policies that you knew very well had (sic) issues which you personally were aware of (sic) and indeed it was your responsibility to resolve or account for. We are satisfied that you continuously covered up for the non-performance of the accounts contrary to the company policy.
>
> Some of the accounts cited inter alia are:
>
> 1. Abdirizik Hussein Farah Shs 28,318
> 2. Jane Muthoni Shs 20,000
> 3. Kamau Nyoike Shs 22,947
> 4. Charles Mungai Gakuo Shs 22 385
> 5. Stabket Gatonye Kagimbi Shs 12,194
> 6. Francis Nganga Shs 16,052
>
> In addition, over your employment period, you have miserably failed to reconcile the underwriter accounts which was one of the key responsibilities, indeed the main reason for your employment, details of which are well known to you. You have continuously misled the Board of Directors to cover up for your underperformance. This is tantamount to gross incompetence.
>
> In the circumstances, we are satisfied that you acted in breach of clause 11 of your employment contract dated December 1, 2009 and accordingly dismiss your employment summarily.
>
> Your pension to date stands at Shs 636,063.00 which is payable immediately.
>
> Purely on humanitarian grounds, the company will allow the existing medical cover to run until expiry next March. Should it not be required, kindly let us know as soon as possible.
>
> Please let us have your proposal in the next 7 days to repay the existing loans owed to the company. Should we fail to receive a suitable proposal within the period, we reserve the right to take appropriate action.
>
> Without further reference to you, please also return the following company properties: laptop, iPad, keys to the main door, keys to your desk drawers and the Operations office door.
>
> Kindly acknowledge receipt of this letter by signing and returning a copy to us.

We thank you for the period you served in this company and wish you well in your future endeavours.

Yours Sincerely,

Mrs SN Mwangi

Director."

a. At the Employment and Labour Relations Court

9] Aggrieved by the respondent's action, the appellant instituted a suit before the Employment and Labour Relations Court (ELRC) vide ELRC No 1375 of 2014 for unlawful and wrongful termination. In his claim dated August 18, 2014 and filed in court on even date, it was the appellant's case that the summary dismissal was in contravention of article 27 of the Constitution; that it was discriminatory, wrongful, malicious and unfair; that it was an afterthought and a feeble attempt by the respondent to justify constructive termination. It was also his assertion that he was not given an opportunity to be heard. More specifically, the appellant sought:

a) A declaration that the respondent's conduct towards him was discriminatory;

b) Damages for discrimination and mental anguish;

c) A declaration that the termination of his employment was wrongful, malicious and unfair;

d) An award of Ksh 198,675 being unpaid salary for the month of July 2014;

e) An award of Ksh 198,675 being 1 month's salary in lieu of notice;

f) An award of Ksh 1,639,068.75 being unpaid house allowance for 55 months;

g) An award of Ksh 447,318.75 being gratuity/service pay for 4 years and 6 months;

h) An award of Ksh 2,384,100 being 12 months' salary as damages for wrongful termination;

i) Certificate of Service.

10. In opposing that claim, the respondent's contention was that in the first instance, the appellant had used forged certificates to secure employment. That in fact, it was all along sympathetic to the appellant's situation and did everything within its power to support him and facilitate his treatment evident in their paying his full salary from November 2013 until June 2014. In addition, that prior to the dismissal, the respondent carried out investigations into some accounts and established that the appellant had collected company money on behalf of his employer, which he failed to account for. Further, the respondent contended that the decision to suspend the appellant was difficult as it was also informed by the fact that the he could only move around with the aid of a walker and had great difficulty accessing the office via the stairs. The respondent added that this state of affairs not only compromised his capacity to work but also dented the respondent's image, by appearing to retain in the office, an employee who was evidently ill.

11. It was also the respondent's argument that it was only upon receipt of the letter of the intended suspension of services, that the appellant availed a belated medical report. As a consequence, the respondent suspended the appellant on medical grounds pointing out that although it had been sympathetic to the appellant's situation, it needed to take into account the company's business interests in handling the matter. The respondent disproved the appellant's claim of discrimination against him.

12. The trial court framed three issues for determination as follows: - whether the respondent violated the appellant's right under article 27 of the *Constitution*; whether the respondent's dismissal was lawful and fair; and whether the appellant was entitled to the reliefs sought?

13. On the issue of the appellant's right under article 27, the trial judge found that the respondent not only failed in discharging its duty but also exhibited discrimination against the appellant on account of his illness which had a disabling effect. The court was unable to find any backing for this form of suspension, either in law or in the respondent's internal rules and procedures, thus declaring the procedure adopted by the respondent, unlawful and discriminatory. It was the trial Judge's view that while the employer is entitled to consider retirement of an employee suffering from a prolonged illness on medical grounds, it can only do so subject to due procedure, including a notification to the employee that a medical report may be relied upon to retire them on medical respondent decided to 'suspend the appellant's employment together with all accruing benefits.'

14. As regards the issue of whether the dismissal was lawful and fair, the learned Judge opined that the reasons given for the summary dismissal bordered on poor performance and misconduct which could only be ascertained pursuant to due process at the work place, in the absence of which they remained mere allegations which did not meet the threshold of reasons set out in section 43 of the *Employment Act*. Further, that there was no evidence that in reaching the decision to terminate the appellant's employment, the respondent considered either the medical report submitted by Dr Kiboi Julius Githinji or by any other medical officer.

15. By a judgment dated October 19, 2017, Ndolo J, entered judgment in favour of the appellant and awarded him a consolidated sum of Kshs 7,781,450/= plus costs and interest distributed as follows; An award of Kshs 5,000,000/= as damages for discrimination; an award of 12 months' salary in compensation for unlawful and unfair termination of employment at Kshs 2,384,100/=; one (1) month's salary in lieu of notice at Kshs 198,675/= as well as salary for the month of July 2014 at Kshs.198,675/=.

b. At the Court of Appeal

16. Being aggrieved by the decision of the trial court, the respondent filed Civil Appeal No 307 of 2018 at the Court of Appeal premised on 12 grounds that the learned judge erred in law and in fact in:

    (i) finding that the appellant discriminated against the respondent;

    (ii) awarding the respondent Kshs 5 million in damages for discrimination;

    (iii) finding that the appellant had unlawfully and unfairly terminated the respondent's employment;

    (iv) awarding the respondent damages for unlawful termination;

    (v) finding that the appellant had terminated the respondent's employment without notice;

    (vi) awarding the respondent one month's salary in lieu of notice;

    (vii) disregarding the principles governing redress of violations of fundamental rights and freedoms;

    (viii) failing to observe the doctrine of stare decisis in determining the suit before the court;

    (ix) finding for the respondent against the weight of evidence and submissions;

    (x) considering extraneous matters which were not supported by evidence;

(xi) allowing a multiplicity of awards claimed by the respondent;

(xii) awarding Kshs 7,781,450/= without considering the appellant's mitigating actions.

17. In its determination, the Court of Appeal noted that it was not in dispute that the appellant suffered an ailment that occasioned him to be out of office whilst seeking treatment outside the country; that his productivity was not optimal as he still needed to seek medical assistance by way of physiotherapy. He was also unable to move around unaided, and that on account of ill-health, the appellant could not perform like other employees. It was also pointed out that not all employees were sick such that the appellant was singled out for dismissal vis-à-vis another sick employee. Based on the above reasoning, the appellate court therefore concluded that there was no discrimination. If anything, the learned judges considered the fact that the respondent actually supported the appellant in the course of his treatment. The court also cited excerpts from the trial court's judgment which was deemed to demonstrate that the trial court was mindful that ill-health could lead to termination.

18. However, the judges of appeal predicated upon the fact that although the appellant was blamed for financial misappropriation and various transgressions, he was neither afforded an opportunity to defend himself nor was he subjected to any disciplinary process as provided under sections 43(1) and 45(2) of the *Employment Act*. Nevertheless, the appellate court found the award of 12 months' salary in compensation to be excessive as the circumstances that led to his dismissal were progressive in nature with the belief that the appellant significantly contributed to his predicament.

19. The Court of Appeal agreed with the trial court that as per the contract of employment, the appellant was entitled to one (1) month's salary in lieu of notice upon dismissal. Consequently, the appeal was partially allowed, the court set aside the award of Kshs 5,000,000/= being damages for discrimination and substituted the 12 months' award in salary by an award of 8 months' salary totaling to a sum of Kshs 1,589,400. One (1) month's salary in lieu of notice and the salary for the month of July, 2014 was also awarded.

c. At the Supreme Court.

20. Dissatisfied by the findings of the Court of Appeal, the appellant has sought redress to this court through a petition of appeal dated September 2, 2019 and filed on even date.

21. It is noteworthy that on October 1, 2019, the appellant filed a notice of motion, seeking extension of time to file a supplementary record of appeal to produce a certified court order and typed proceedings of the Court of Appeal. By a ruling dated September 3, 2020, the court granted the application whereby the appellant was directed to file and serve the supplementary record of appeal within thirty (30) days.

22. Subsequently, on November 13, 2019, the respondent filed an application dated November 8, 2019, seeking orders to strike out the appeal herein on the grounds that the appellant did not have an automatic right of appeal before this court; that the issues in the Appeal did not involve interpretation or application of the Constitution; that the subject matter of the suit revolved around an employer-employee relationship governed by the *Employment Act* and that the mere allegation of a constitutional violation does not in itself clothe the appeal with the attributes of constitutional interpretation or violation under article 163(4)(a) of the *Constitution*.

23. By a ruling delivered on September 4, 2020, the application was dismissed by this court. This court found that the petition of appeal was rightly before it as it involved the interpretation and application of article 27(5) of the *Constitution* as stipulated under article 163(4)(a) of the *Constitution*.

24. The present petition is premised on the following grounds: that the Court of Appeal erred in law;

i. By failing to analyse the evidence on record before reaching its decision on the issue of discrimination;

ii. By introducing new and extraneous facts that were not before the trial court in determining the issue of discrimination;

iii. In its interpretation of article 27(5) of the *Constitution*;

iv. By interfering with the discretion of the trial judge in awarding 12 months' salary for unlawful termination.

C. Parties' Submissions

(i) The appellant

25. The matter came up before us for highlighting of submissions where learned counsel, Miss Cuna was present for the appellant while Mr Omotii appeared for the respondent. The appellant's submissions are dated November 9, 2020 and filed on January 12, 2021. On the first issue, learned counsel for the appellant submits that the Court of Appeal not only failed to re-evaluate the evidence on record holistically but also introduced extraneous evidence in determining the matter before it.

26. The appellant faults the appellate court for finding that not all employees were sick such that he was singled out for dismissal vis-à-vis other sick employee, a fact he says was raised by the trial judge. He argues that neither at the trial court nor at the appellate court was it pleaded or any evidence led that the respondent had other employees with impaired mobility. According to him, it was erroneous for the appellate court to use this as a ground to exonerate the respondent's actions against the appellant.

27. Referring to the Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No 111) which defines discrimination as any distinction, exclusion or preference, the appellant argues that the conduct of the respondent after he resumed duty was nothing short of discriminatory and that he was subjected to undignified treatment solely attributable to his disability. He further argues that in spite of the fact that the respondent acknowledged that the appellant had difficulties in using the stairs at work, no reasonable effort was made to accommodate him to ease his movements within the work place.

28. It is the appellant's submission that the delay in submitting the medical report was an error. As such, the Court of Appeal failed to factor in that the delay was not occasioned by the appellant, but as explained before the trial court, by the fact that the doctor was out of the country and therefore unreachable at the time. Nevertheless, he states that the report was delivered on May 28, 2014, which was still within the 30 days' notice given as the time frame to submit the report in the letter dated May 22, 2014.

29. The appellant therefore posits that the decision to terminate him by disregarding the recommendation by his doctor was not only discriminatory, but was also not backed by any law or any of the respondent's employment policies. He argues that sick, injured or disabled employees do not lose their right to equality as provided under article 27 of the *Constitution* as read with section 5 of the *Employment Act 2007*. He reiterates that the suspension was actually a termination disguised as a suspension as the letter asked him to hand over company property as well as offset any outstanding loans.

30. The appellant also criticizes the Court of Appeal for failing to re-evaluate the entire evidence on record as required as a first appellate court. That it limited itself to the issue of non-production of the medical appraisal report and even then, erroneously captured the issues surrounding the report. He maintains

that the court had a duty to re-assess the evidence on record holistically more so the treatment that the appellant was subjected to from the time he lost his mobility.

31. The appellant maintains that the respondent had a duty to reasonably accommodate him or if, in their opinion, he was no longer tenable to continue with employment, they ought to have terminated the employment in a dignified manner as the deprivation of employment opportunity coupled by his new condition of disability would greatly inhibit his chances of gaining new employment. To support this position, the following authorities were cited. *VMK v CUEA* [2013] eKLR; Management of *Motor Vehicles v Presiding Officer, ILR* 1987 KAR 507; *Marshall v Harland and Wolff Ltd: NIRC* 1972)

32. The appellant implores this court to give effect to the full meaning of article 27 (5) especially in relation to his case, whereby his circumstances changed due to an illness that affects his mobility. It is urged that this court affirms the findings of the Employment and Labour Relations Court in ELRC No 1375 of 2014 and award damages of Ksh 5,000,000. To this end, reliance is placed on the case of James Mulinge v Freight Wings Limited [2016. eKLR; *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017. eKLR; and *VMK v CUEA* [2013] eKLR. On the issue of costs, it is submitted that costs should follow the events.

(ii)The respondent

33. In response, Mr Omotii, learned counsel for the respondent opted to rely on their replying affidavit filed on November 13, 2019 together with their submissions filed on December 14, 2020. The respondent does not dispute the fact that the doctor's report dated May 27, 2014 recommended that the appellant could resume work in 2 months' time. However, the respondent argues, that in considering 2 months from May 27, 2014, the earliest the appellant ought to have resumed work would have been July 27, 2014. Therefore, it is contended that the upshot of the doctor's report was that it was wrong ab initio for the appellant to have resumed work in February 2014 and that the appellant's continued stay at the office was detrimental to his quick recovery. This, the respondent submits, informed their decision to recommend that the appellant continue resting at home to aid in his quick recuperation.

34. The respondent is adamant that at no certain point did it subject the appellant to differential treatment because of his health condition. If anything, the respondent posits that its actions were justified as the same was meant to aid the appellant's quick recovery. That no evidence was adduced at the trial court as well as the Court of Appeal that the respondent subjected the appellant to undignified treatment because of his disability.

35. The respondent further refutes the claim that the appellate court introduced extraneous facts. That all the court did was to analyse the circumstances of the matter and determine whether a case for discrimination was established. The respondent maintains that there was no new material that was introduced at the appellate court. Further, it is the respondent's assertion that failure to furnish the medical appraisal in good time was solely attributable to the appellant since the appraisal was to emanate from his personal doctor who was only known to him. They concurred with the Court of Appeal's finding that the appellant failed to cooperate in procuring the medical report.

36. The respondent submits that the appellant has failed to make out a case for discrimination and urges this court to uphold the Court of Appeal's finding that there was no discrimination. Furthermore, that even if this court were to find a case for discrimination, which is vehemently denied, the award of Kshs 5,000,000 as damages for discrimination is inordinately high and unjustifiable in the circumstances and ought to be reviewed. It further submits that it is important that any court award ought to be considered reasonably fair by the society at large and not meant to put a litigant out of business. (See

Alexander v Home Office (1988) 2 All ER 118; *DK Njagi Marete v Teachers Service Commission* [2013] eKLR)

37. It is the respondent's view that there exist unique circumstances in this case which will go a long way to mitigate the quantum of damages. They urge that these circumstances are evident in various forms, first, by playing a significant role in ensuring the appellant received his pension and secondly, by paying off the appellant's salary for over 7 months even though the appellant did not work. In addition, that throughout the appellant's sickness, the Respondent was compassionate and greatly facilitated his travel to India for treatment; voluntarily surrendered the two motor vehicle registration numbers KAN 429N and KBJ 278P despite the appellant being indebted to it. The respondent also contends that they increased the appellant's salary even though he had been out of work for some time, and, that the appellant was also awarded damages for unlawful termination of employment and one month's salary in lieu of notice. (See *Duncan Otieno Waga v Attorney General* [2014] eKLR)

38. Counsel for the respondent reiterated that the law recognizes that illness can be a reason for termination of employment. As such, termination on the basis of illness per se does not connote discrimination and this was properly appreciated and analyzed at page 42 of the Judgment. They invite this court to agree with the Court of Appeal on the finding on the issue of discrimination. In regard to quantum of damages, they maintain that no discrimination was proved and therefore the issue of quantum of damages is not germane but even so, that this court should consider all relevant factors and find that the award of damages for Kshs 5 Million by the trial court was quite excessive. In conclusion, the respondent urges this court to dismiss the Petition in its entirety for lack of merit with costs.

39. In brief reply, Ms Cuna contended that the issue of facilitating treatment was not proved at either the trial court or at the appellate court. As such, this was an issue that was introduced at the appellate court. Secondly, that the suspension was in itself a termination guised as a suspension. Therefore, as at June 23, 2014, the appellant's employment had been terminated on the basis of medical grounds, counsel submits.

D. Issues for Determination

40. Flowing from the above submissions, the following issues arise for consideration and determination:

    i. Whether the appellant was treated by the respondent in a discriminatory manner on account of physical incapacity contrary to article 27(5) of the *Constitution*.

    ii. Whether the procedure for termination of employment was unlawful and unfair.

    iii. Whether the damages granted were excessive in the circumstances?

    iv. Who should bear the costs of the appeal?

E. Analysis and Determination

41. On the issue of discrimination contrary to article 27(5) of the *Constitution*, the appellant complained that he was subjected to undignified treatment that he received from the time he resumed duty in February 2014. That the conduct of the respondent from the time he resumed duty was nothing short of discriminatory and the undignified treatment was solely attributable to his disability. It was also his submission that no reasonable steps were taken to accommodate his ease of movement. As such, this disadvantaged the appellant as he was still being subjected to the same conditions that he had been working with prior to falling ill and losing his mobility.

42. The High Court was categorical that the appellant was discriminated upon based on his disability while the Court of Appeal held that no discrimination was proved. Discrimination against any employee is specifically provided for under article 27 of the Constitution as well as section 5 read together with section 47 of the *Employment Act*. article 27 of the Constitution at clause 4 and 5 provides that:

> "(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
>
> (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) (Emphasis)."

43. Therefore, no person should directly or indirectly discriminate against another person on any of the grounds specified or contemplated in clause (4) more particularly on account of health status or disability. Section 5 of the *Employment Act* (cap 226) provides that:

> "(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee —
>
> (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status."

44. The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Sub-section 7 thus provides:

> "(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section."

45. Section 47 (5) of the *Employment Act* further requires that:

> "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

46. This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.

47. This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

> " 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> 50. This court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
>
> > " ...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
>
> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

48. *Black's Law Dictionary,* 10th Edition defines discrimination as "failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." However, it must be appreciated that not all cases of distinction amount to discrimination. Learned author Robert K Fullinwider; in *The Reverse Discrimination Controversy* 11-12 (1980) states;

> " The dictionary sense of discrimination is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currently, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice discriminates (distinguishes in favor of or against). The temptation is to move from X distinguishes in favor of or against to X discriminates to X is wrong without being aware of the equivocation involved."

49. Discrimination is also defined in the *International Labour Organisation Discrimination (Employment and Occupation)* Convention, 1958 (No 111) as follows: -

> " For the purpose of this convention the term discrimination includes –

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

such other distinction exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organizations where such exist, and with other appropriate bodies –

Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

50. In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows:

> " Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
>
> Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."

51. From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification. Section 7(4) of the Kenyan *National Cohesion and Integration Act* (No 12) of 2008 provides that:

> " It is unlawful for a person, in the case of a person employed by him at an establishment to discriminate against that employee—
>
> (a) in the terms of employment in which he affords him;
>
> (b) in the way he affords him access to opportunities for promotion, transfer or training or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or (c) by dismissing him, or subjecting him to any other detriment.

52. At this point, it is thus important to distinguish between direct and indirect discrimination. The distinction was clearly outlined in the High Court case of *Nyarangi & others v Attorney General* [2008] KLR 688 as follows:

> " Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs v Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in

a job application was found "to disqualify negros at a substantially higher rate than white applicants".

53. The Court of Appeal in *Mohammed Abduba Dida v Debate Media Limited & anot*her [2018] eKLR quotes the case of *Kedar Nath v State of WB* (1953) SCR 835 (843) where the Supreme Court of India stated that:

> " Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

54. In considering indirect discrimination, Justice Silber in the UK High Court case of Queen, on the Application of *Sarka Angel Walkins Singh v the Governing Body of Aberdare Girls High School, & another* [2008] EWHC 1865, (paragraph 38), considered the claimants' case on the grounds of indirect discrimination, prescribing several steps to guide the proof:

(a) to identify the relevant 'provision, criterion or purpose', which is applicable;

(b) to determine the issue of disparate impacts, which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;

(c) to ascertain whether the provision, criterion or practice also disadvantages the claimant personally; and

(d) to consider whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving such a legitimate aim.

55. The Supreme Court of United Kingdom in *Essop & ors v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27 explained six key features of indirect discrimination as follows:

> " 24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others.
>
> 25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual.
>
> 26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr. Sean Jones QC for Mr Naeem called them "context factors").
>
> 27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.

28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence.

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test."

56. We are persuaded by the reasoning in the comparative jurisprudence as set above as it properly illustrates and expounds on the salient features of indirect discrimination. In the premises, the respondent claimed that the suspension of the appellant vide its letter dated 22 May 2014 was purely premised on the fact that the appellant was visibly unwell and that he failed to avail a professional opinion on his health. That even though the doctor's report was availed, the said report was too confusing and inconclusive. The respondent is emphatic that at no point did it subject the appellant to undignified treatment.

57. It is common ground that on April 14, 2014, the respondent wrote a letter asking the appellant to stay at home until he could walk unaided. He was also requested to produce a medical report from his doctor. On May 22, 2014, the respondent wrote a follow up letter to the appellant complaining that he had not availed the medical report and expressed their intent to suspend him. On May 28, 2014, the appellant furnished the respondent with the medical report from Dr. Kiboi Julius. On June 23, 2014, the respondent suspended the appellant on health grounds. On July 7, 2014, the appellant through his Advocates wrote to the respondent challenging the suspension terming it as constructive dismissal. On July 11, 2014, the respondent replied to the same letter denying the allegations for constructive dismissal. Eventually, the respondent summarily dismissed the appellant for gross incompetence.

58. A cursory glance at the chronology of events inclines us to think that the respondent's actions to terminate the appellant bordered on outright victimization. It appears that the respondent did not take lightly the contents of the appellant's letter of July 7, 2014 and the demands made therein. In their response, the respondent clearly expressed:

> " ...Our client did not terminate your client's employment as alleged in your letter aforesaid but only suspended him as he has been unable to carry out his duties due to his medical condition."

59. The respondent submitted that the suspension on medical grounds was justified and not discriminatory as the only conclusion that could be drawn from the doctor's report was that the appellant was unwell and therefore he could not resume work in his then state. With respect, we are unable to agree with the respondent's submissions that the report was inconclusive, and that he was uncooperative in furnishing the report. Granted that the report was availed, albeit late, it is our considered view that no prejudice would have occasioned the respondent in considering the recommendations therein. It was the doctor's recommendation that the appellant resumes duty in two months' time subject to periodic review of the appellant's condition. Furthermore, in the said respondent's letter of April 14, 2014, no specific timeline was given to the appellant to avail the report. It only stated "as soon as possible". In that regard, the respondent's action was drastic and harsh which in our considered view was unwarranted in the circumstances.

60. 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."

61. Similarly, the onus was on the respondent to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal. We think that the respondent was hell bent in wanting to get rid of the appellant from employment to an extent that they had to circumvent due process in a bid to find fault by conducting extraneous investigations when in fact prior to that they had given him a salary raise due to his hard work. In addition, there was no evidence that investigations were conducted on all other employees during that period and hence he was subjected to different treatment which emanated from his disability. The respondent also failed to demonstrate that they tried to accommodate the Appellant in his current state. As such, these actions by the respondent amounted to indirect discrimination due to differential treatment.

62. In view of the circumstances, the burden of proving that the appellant was medically unfit to continue serving shifted to the respondent to prove the same using an expert opinion. The respondent never produced any medical assessment to demonstrate that the appellant was not capable of performing his duties any more by virtue of his physical incapacity. We reiterate the fact that the respondent disregarded the medical report by Dr Kiboi and proceeded to not only suspend him on medical grounds but eventually terminate him on grounds of gross incompetence was unjust and discriminatory.

63. The South African decision in *Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and Other*s (supra) which has an uncanny resemblance to the facts in this instant case, held that:

> " 18. Ferreira could not get medical reports that declared her unfit for work because she was not unfit to work. Dr Meyer reported on 5 November 2003 that Ferreira was fit for half day work and on 27 October 2004 he reported that she was unfit for normal work. Orthobond, a panel of Orthopedic surgeons, declared her to be 40% disabled in her work situation. In an email dated 17 May 2004 Rene van Eck of the Bank's Corporate Health department informed Jordaan that pain itself is not sufficient to render a person disabled, that most patients with fibromyalgia are capable of working, often with job modifications and that only a few patients are eventually unable to work.
>
> 19. The Principal Officer of the Bank's Group Retirement Fund, G P Stapley, informed Ferreira and Jordaan on 12 November 2004 that according to the Fund's specialist physician and cardiologist, Ferreira was not permanently incapacitated and that it would be in her best interests for her "ultimate health" to "make a special effort to continue working even though this may mean absences on some days". 29 On that basis, the Fund declined Ferreira's application for early retirement. 20. Despite these reports, and notwithstanding her obvious disability which the Bank acknowledged, and the resultant absenteeism, the Bank evaluated Ferreira's performance as if she were a person of full capacity.30 It assessed her performance as poor, even though it

did not know her to be a poor performer.31 It arrived at this assessment after Ferreira was unable to produce medical reports to prove that she was unfit for work."

64. 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.

65. Section 2 of the *Persons with Disabilities Act* No 14 of 2003 defines"disability" as a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation. The Act is therefore silent on what constitutes a temporary or permanent disability. As long as the impairment impacts adversely on social, economic, or environmental participation of an individual, it is deemed to be a disability. A perusal of the Record of Appeal indicates that the appellant accepted his condition and took steps to register with the National Council for Persons with Disabilities as Persons with Disabilities (PWD) and was issued with a disability card No XXX on XXX January 2015.

66. Section 15 of the *Persons with Disabilities Act* No 14 of 2003 expressly prohibits discrimination by employers. The Act goes further to require employers to put in place special facilities in order to accommodate its employees with disabilities. It provides:

> " 15. Discrimination by employers prohibited
>
> (2) Notwithstanding subsection (1), an employer shall be deemed not to have discriminated against a person with a disability if —
>
> (a) the act or omission alleged to constitute the discrimination was not wholly or mainly attributable to the disability of the said person;
>
> (b) the disability in question was a 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 required at the work place to accommodate the person with a disability, which the employer cannot reasonably be expected to provide.
>
> .....
>
> (5) An employer shall provide such facilities and effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disabilities." (emphasis ours)

67. The duty to accommodate was aptly elaborated in the *Canadian case of MacNeill v Canada (Attorney General*) (CA) 1994 CanLII 3496 (FCA) as follows:

> " Thus, Ms MacNeill's admission that she is incapable of performing the duties of her position does not prevent her from being a victim of a discriminatory refusal to continue to employ her. The question under the CHRA169 is not whether she is incapable but whether she is losing her employment by reason of her disability, and if so, whether the employer has fulfilled its duty to attempt to accommodate her. The law does not require that employers hire or continue to employ persons who are or have become disabled; it does, however, oblige them to examine whether an appropriate and not unduly burdensome change in the work environment would allow such persons to do, or to continue doing their job."

68. Similarly, the duty to accommodate was also expressed in Standard Bank of South Africa v Commission for Conciliation, Mediation & Arbitration and others (supra) thus:

> "The Bank's duty to accommodate stems from its overriding obligation not to discriminate. Quite simply, the Bank had a legal obligation to accommodate Ferreira to ensure that she could continue to work.180 It also bore a reverse onus of ensuring that it did not compel Ferreira or encourage her to terminate her employment.181 From the following it emerges that the Bank did encourage her to leave...
>
> A bald refusal to allow a half day work demonstrates such a high degree of inflexibility about a frequent form of accommodation that the court is fortified in its conclusion that the Bank had no intention of retaining her in its employ from the outset. The Bank was preoccupied with its own needs rather than investigating how Ferreira could be accommodated. If it seriously wished to persuade the court that a half day job was unjustified, it should have motivated fully. 188 Guibord v Canada (TD), 1996 CanLII 3880 (FC) ...
>
> > " The Bank also dismissed Ferreira in bad faith. Keays v Honda Canada Inc 220 is similar on the facts to this case. In that case, Honda dismissed a dedicated employee for insubordination for disregarding an instruction to see Honda's doctor. The court found that the instruction was merely a "set up for failure" because the doctor had already made up his mind that the employee's condition, Chronic Fatigue Syndrome ("CFS"), was bogus. 142. Similarly, Ferreira was set up for failure but through an incapacity dismissal process. Cochraine and Jordaan deliberately disregarded the advice of the doctors given on four occasions to procure an OT report. Furthermore, they were less than forthright about their reasons for not supplying Ferreira with a headset and computer. 143. Contrary to the Bank's stated221 intention of placing her in a sympathetic environment, Ferreira found Cochraine's attitude "negative and morale-breaking".222 Cochraine removed Ferreira from computer related jobs that were intellectually stimulating to shred paper, distribute faxes and clean cupboards, jobs that were physically more demanding and intellectually debilitating. 220 Keays v Honda Canada Inc 2005 CanLII 8730 (ON SC) para 40-44 221 L 14, p 316 of bundle 222 Para 61, p 438-9 of bundle 51 144. The Bank's altruism was more apparent than real. In making this finding the court is in respectful disagreement with the arbitrator who found that the Bank went to "great lengths" 223 to assist Ferreira."

69. In light of the above, we find that the respondent failed to demonstrate that there would have been any undue hardship they would have incurred if they chose to reasonably accommodate the needs of the employee by providing amenities such as a ramp to ease the appellant's movement, or even providing flexible working hours. In fact, the respondent in their letter dated April 14, 2014 expressly admitted that they did not have the facilities to accommodate the appellant in the office when they stated that:

> "In the circumstances and until you are able to move around the office unaided, and while you continue to attend the physiotherapy clinics, we ask that you rest at home as the office does not have suitable facilities and conditions for your easements." (sic)

70. The fact that the respondent expected the appellant to continue working in the same conditions as the rest of employees was outrightly unreasonable. The respondent arbitrarily resolved that the appellant was no longer productive by virtue of his inability to walk unaided when in fact they failed to demonstrate what steps they took to accommodate him in his state.

71. It is not disputed that the respondent catered for the medical expenses of the appellant through the medical cover and even continued to pay his salary for the period he was away for treatment. However, in the circumstances, we are inclined to respectfully agree with the trial court's finding that the respondent exhibited indirect discrimination towards the appellant. The issue of gross incompetence was an afterthought. As such, we reiterate that the respondent's action to dismiss the appellant was extremely harsh when in fact they had not reasonably demonstrated what measures they took to accommodate the appellant's condition.

72. On the issue of whether the procedure for termination of employment was unlawful and unfair, there is no dispute that the appellant was employed by the respondent as its operation manager until August 1, 2014 when he was relieved of his duties by the respondent for gross incompetence. The termination letter expressly stated:

> "You have continuously misled the board of directors to cover up for your underperformance. This is tantamount to gross incompetence.
>
> In the circumstances, we are satisfied that you acted in breach of clause 11 of your employment contract dated December 1, 2009 and accordingly dismiss your employment summarily."

73. Under section 45(2) of the *Employment Act*, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the respondent initially suspended the appellant on "health grounds" on the basis that he had failed to avail the medical report in which the respondent needed to appraise his medical condition. However, the medical report was eventually produced, albeit late.

74. After some time, a termination letter was issued on the basis of gross incompetence after the respondent allegedly investigated the appellants' accounts. It is noted that the termination letter did not mention anything to do with the health condition of the appellant but was purely based on his performance at work. After careful consideration of the appellant's letter of appointment, clause 11 on notice of termination, provided that appellant's employment was terminable without prior notice if found guilty of unsatisfactory conduct.

75. However, the procedure followed to terminate the contract was in breach of section 41 and 45 2(c) of the *Employment Act* for the reason that the appellant was not accorded a chance to defend himself or respond to the allegations against him. Although the letter of appointment provided for no prior notice

when terminating the employment due to gross misconduct, that stipulation of the contract cannot be used to oust a mandatory and express statutory provision in section 41 of the said Act. Consequently, the failure to follow fair procedure rendered the termination of the appellant's employment unfair within the meaning of section 45 of the Act.

76. Although the Court of Appeal found that the summary dismissal was unfair, the learned judges of appeal attributed the dismissal to the appellant's conduct.

They held that the appellant's transgressions contributed to his dismissal when in fact the respondent had been lenient and compassionate to him throughout his sickness. They only took issue with the fact that he was never afforded an opportunity to be heard.

77. It is important to note that under the *Employment Act*, there is no express provision for dismissal on medical grounds. However, the employer is required to demonstrate that medical assessments were conducted which rendered the employee incapable of performing. In regard to the dismissal in cases of incapacity, the respondent is required to have a hearing under section 41 of the *Employment Act* which provides as follows: -

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

78. It is evident that no hearing was demonstrated to have been conducted and the only inference one can draw is that the dismissal was unfair and unlawful for failing to accord the appellant a fair hearing. The respondent was required to facilitate the termination in accordance with section 41(1) of the *Employment Act* in order to come within the ambit of fairness. The allegations that the appellant faced would have well been explained if granted the opportunity so as to avoid the harsh sanction of a summary dismissal as contemplated under section 41 of the *Employment Act*.

79. Moreover, section 44(4) of the *Employment Act* does not give an employer a blanket right to dismiss an employee at will. However, grave the circumstances of the employee's misconduct, he was entitled to be heard before he was dismissed.

Section 41(2) of the *Employment Act* provides that:

> "(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

80. The right to be heard is the cornerstone of fair labour practices. Where the circumstances do not allow a hearing before summary dismissal, the duty is upon the employer to set such out. Section 5(8) of the *Employment Act* read together with section 12 thus provides:

> "12. A statement under section 10 shall—
> (1)

(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules."

In light of the above, we find that the appellant's summary dismissal was unfair, unjust and unlawful for want of due process.

81. Was the award of damages for discrimination inordinately excessive in the circumstances? The respondent contends that even if this court were to find a case for discrimination which is vehemently denied, the award of Kshs 5,000,000/= for discrimination was too high and unjustified. They urge that should this court find a case for discrimination, then they should reduce the trial court's award for discrimination from Kshs 5,000,000/= to Kshs 1,000,000/=. According to the respondent, any court award ought to be considered reasonably fair by the society at large and not meant to put a litigant out business.

82. Having established that the appellant's summary dismissal was unlawful and therefore wrongful, the trial court awarded the appellant 12 months' salary compensation, Kshs 5,000,000 for discrimination, one month's salary in lieu of notice and salary for one month. In awarding the said reliefs, the trial Judge considered the chances of the appellant who was now confined in a wheel chair securing alternative employment and the respondent's callous conduct in the way they handled the appellant.

83. The Court of Appeal however was of a different view. Having found that there was no discrimination, they set aside the award for discrimination and further substituted the 12 months' salary for 8 months. We have found that the appellant was prematurely and unlawfully constructively dismissed on account of his disability which was a form of indirect discrimination. Therefore, he was rightfully entitled to the reliefs sought. The question then is, did the trial court excessively award the damages, more specifically for discrimination?

84. To answer, we are guided by the Court of Appeal' s pronouncement in the case of *Ol Pejeta Ranching Limited v. David Wanjau Muhoro* [2017] eKLR, in which the court held as follows;

> " 52. Turning to the amount awarded on account of discrimination, this was an exercise of judicial discretion. It is trite law that an appellate court will not disturb an award of damages by a trial court unless it is shown that the award is inordinately low or high, or where the court took into account irrelevant factors or failed to consider relevant factors and thereby arrived at an erroneous estimate of damages."

85. In *Ol Pejeta Ranching Limited* (*supra*), the trial court (Rika, J) had awarded the Respondent 12 months' gross pay in compensation for unfair termination of employment, amounting to Kshs 3,489,484/= and Kshs 18,256,947/= in cumulative pay disparity on account of discrimination on the basis of his colour. However, the Court of Appeal having affirmed that there was violation on account of discrimination, set aside the trial court's award and substituted thereof a sum of Kshs 7,500,000/=. The court also reduced the sum awarded for unfair termination of employment to 6 months' Kshs 1,744,542/=. The appellate court however clarified that the sum of Kshs 7,500,000/= was to compensate the employee for the discriminatory underpayments made to him over the years he was in the appellant's employment.

86. We also resonate with the Court of Appeal's finding in *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR in which it held:

> " 48. Whichever way one looks at it, either as breach of a constitutional or statutory right, the net effect was the same. We respectfully endorse Justice Rika's holding in GMV v Bank of Africa Limited (supra): -
>
> > " This court does not encourage employees to claim multiple remedies arising from the same wrongdoing on the part of the employer, whether these violations are claimed to infringe the Constitution, the Statute or the Contract." ...
>
> 54. In this appeal, if the appellant was not discriminatory in its retirement policy, the respondent would have worked for a maximum of 5 years before attaining the age of 60 years. If her monthly salary was Kshs 43,450, over a period of 5 years she would have earned Kshs 2,607,000.
>
> Had the learned judge taken that into consideration, we think she would have reduced the award on account of discrimination. In our view, the judge failed to take into account an important consideration and thereby arrived at a figure which we think was excessive in the circumstances. We hereby set aside the award of Kshs 5,000,000 and substitute therefor an award of Kshs 3,000,000 for discrimination and unfair labour practice."

87. Similarly, we are of the opinion that an award of damages should not be punitive to one party but at the same time it should act a deterrent to employers who engage in discriminatory acts. Employment laws in Kenya have made great strides in ensuring that employees are protected from discriminatory acts by the employer and the onus is therefore on employers to ensure that they set out proper policies to govern their engagement with employees, to avoid falling into dangers of workplace discrimination.

88. In the circumstances, it is our considered view that the award of Kshs 5,000,000 was inordinately high and disproportionate in this instance. We have also considered the trial court's reasoning in awarding the 12 month's salary in compensation for unlawful and unfair termination and affirm that decision. We find that the award of 12 months' salary in compensation as awarded by the trial court was sufficient given the circumstances in the case.

89. Having found that, to what extent then can the Supreme Court interfere with assessment of damages? It is trite that an award of damages is discretionary in nature. We reiterate our holding in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*, Petition No 6 of 2014; [2017] eKLR where we observed that:

> " The [Supreme] Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. The Constitution from which this court, and indeed all courts in the land, derive their legitimacy decrees that we must do justice to all."

90. In light of the foregoing, this court can invoke its inherent powers to ensure that justice should not only be done but should manifestly and undoubtedly be seen to be done to all litigants. In conclusion, we partially allow this Appeal to the extent that we reduce the award of damages for discrimination from Ksh 5,000,000/= to Kshs 2,000,000/= and reinstate the trial court's award of 12 months' salary for unfair dismissal. It is so ordered.

F. Orders

(a) The petition of appeal dated September 2, 2019 partially succeeds.

(b) The Judgment of the Court of Appeal dated July 19, 2019 is hereby set aside.

(c) Judgment be and is hereby entered in the following terms;

i. Damages for discrimination .....Kshs 2,000,000

ii. 12 months' salary in compensation...Kshs 2, 384,100

iii. 1 Months' salary in lieu of notice..... Kshs 198,675

iv. Salary for July 2014.....Kshs 198,675

Total.....Kshs 4,781,450

(d) Costs be awarded to the appellant.

(e) The amounts awarded shall attract interest at court rates from the date of the trial court's judgment until payment in full.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

.....

M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA