

A. Introduction

Article 54 of the **Constitution of Kenya 2010** introduced massive protection for Persons living with Disability (PWD's), including their entitlement to be treated with dignity and respect; to be referred to in a manner that is not demeaning; and to access educational institutions and reasonable access to all places, public transport and information. These protections are aimed at promoting equality and non-discrimination of PWD's, by ensuring their full and equal enjoyment of all rights and fundamental freedoms as guaranteed in **Article 27** of the Constitution.

With specific regard to employment, the law in Kenya imposes a duty upon employers to take reasonable steps to prevent any arrangements that may place persons living with disability i.e. physical, sensory, mental, visual, hearing, learning or physical incapability at a substantial disadvantage in comparison with persons who are not disabled. This requirement falls under the broad **Principle of Reasonable Accommodation**, and failure to carry out that duty amounts to discrimination against PWD's.

B. Legal Provisions on Reasonable Accommodation

As stated above, **Article 54** of the Constitution guarantees the rights of persons with any disability to access materials and devices to overcome constraints arising from the person's disability. In addition, **Section 12** as read with **Section 15 (5)** of the **Persons with Disability Act, 2003**, enjoins employers to provide such facilities and to effect such modifications, whether physical, administrative or otherwise, in the workplace as may reasonably be required to accommodate persons with disability.

Moreover, considering Kenya is a Party to the **United Nations Convention on Persons with Disability, 2006**, the Convention is binding by dint of Article 2(5) and 2(6) of the Constitution. **Article 2** of the said Convention defines **Reasonable Accommodation** as the necessary and appropriate modification and adjustments, where needed in a particular case, to ensure persons with disabilities enjoy or exercise all human rights and fundamental freedoms on an equal basis with others, without imposing a disproportionate or undue burden. Further, the Convention under **Article 27** makes provision for work and employment mandates State Parties to ensure Reasonable Accommodation is provided to PWD's at the workplace.

C. Case Analysis

The duty to reasonable accommodation of PWD's in employment was aptly elaborated in the Canadian case of **MacNeill vs Canada (Attorney General) (CA) 1994 CanLII 3496 (FCA)** in which the Court affirmed that:

"...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."

The need to ensure Reasonable Accommodation of persons living with disability in employment has been greatly emphasized by the Kenyan Courts in all the stages of employment as illustrated in the following judicial decisions:

ii. At the Recruitment Stage

In **Wilson Macharia vs Safaricom PLC [2021] eKLR**, the Respondent was recruiting for the role of Customer Experience Executive, and interviewees were to undertake the SHL Computerized Aptitude test, which was one of the key stages of the recruitment process. The Petitioner, who was shortlisted for

the position was not able to undertake the said test as he was visually impaired. Further, the Respondent did not avail special facilities or modifications to enable the Petitioner undergo the technical part of the interview. The Court affirmed that the Respondent had the duty and obligation to reasonably accommodate the Petitioner and which duty entailed, procuring the necessary software to enable the Petitioner undertake the technical part of the recruitment process.

i. During Employment

The Court in **Lucy Chepkemai vs Sotik Tea Company Limited [2022] eKLR**, the Petitioner, who was employed by the Respondent in 2006, was diagnosed with eyesight complications and lost her eyesight in 2016, in the course of her employment. She was terminated from employment in 2017 due to her visual impairment. The Court noted that the Respondent did nothing to accommodate the Petitioner in the company as it never provided any special facilities for her or modified her work environment to reasonably accommodate her new life without eyesight. The Court held that the termination of the Petitioner from employment was unjustified and discriminatory and awarded the Petitioner KShs. 2 million as compensation for discrimination. (*See also Juliet Mwangeli vs Smollan Kenya Limited [2019] eKLR*).

ii. At the time of termination.

In **Paul Pkiach Anupa & Anor vs Attorney General & Anor [2012] eKLR**, the Petitioner, who was a Police Constable, was involved in an accident while on official duty and sustained spinal cord injury resulting in paralysis of his lower limbs. He was retired from service at the age of 28 years, despite his doctors recommending that he be assigned light duties like receptionist, radio room operator, clerical duties and or telephone operator as his disability was limited to his lower limbs. The Court found that the Respondents had violated the Petitioner's rights by retiring him prior to attainment of the prescribed retirement age, without taking into account the possibility of reasonable accommodation, yet they had the ability to do so. The Petitioner was awarded general damages of **KShs. 800,000.00** as compensation for unlawful termination.

D. Conclusion

The employers' duty to accommodate person with disability springs from the overriding obligation not to discriminate and protection of the right to dignity. As the saying goes "**Disability is not Inability**" disability alone does not translate to incapacity to perform employment duties. The law therefore imposes a legal obligation upon employers to accommodate persons with disability and ensure that they gain and/or remain in employment and avoid placing such an employee at a substantial disadvantage.

On the flipside, it is paramount to note that the Principle of Reasonable Accommodation also aims at striking a balance between the rights of an employee living with Disability and the need to avoid imposing undue burden or hardship upon an employer to accommodate such employee. The application of the Principle of Reasonable Accommodation therefore calls for delicate balancing of the interests of an employee against the capacity, needs and/or financial viability of an employer.

D. Contact us today

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