

Employment Law

ALERT | 3 July 2025



In this issue

KENYA

A new era of employer accountability regarding mental health in the workplace



For more insight into our expertise and services

A new era of employer accountability regarding mental health in the workplace

A significant decision delivered by the Employment and Labour Relations Court has firmly placed mental health on the compliance radar for Kenyan employers. In *AWW (Suing as Next Friend and Mother of GWW) v Central Bank of Kenya (Cause E888 of 2022)* [2024] KEELRC 13585 (KLR) (18 December 2024) the court found that failing to accommodate an employee's known mental health condition amounted to indirect discrimination and procedural unfairness.



Brief facts of the case

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

The claim was allowed in favour of the claimant and the court awarded compensation equivalent to 12 month's salary, damages for discrimination on account of mental disability, less statutory deduction plus costs of the suit and interest at court rates with effect from the date of the judgment.



**EMPLOYMENT LAW
ALERT**

A new era of employer accountability regarding mental health in the workplace

CONTINUED



An employer's duties

In her findings, Justice Hellen Wasilwa identified several key obligations that employers must observe when dealing with employees experiencing mental health issues at the workplace:

Duty to provide reasonable accommodation

The court emphasised that when a claimant is experiencing mental health challenges, they are entitled to a degree of preferential treatment, commonly referred to as reasonable accommodation.

In this case, although the respondents were aware of the claimant's mental health condition, they nonetheless insisted that she attend a hearing. The court found that the respondents failed to show any meaningful effort to accommodate the claimant's condition. This failure was deemed to amount to indirect discrimination.

Duty to investigate the extent of the incapacity and all the possible alternatives short of dismissal

In the judgment, the court declared that the onus was on the employer to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal.

The
**LEGAL
500**

EMEA
**2024
KENYA**

TIER 3
Employment



A new era of employer accountability regarding mental health in the workplace

CONTINUED



An employer's duties...continued

The employer's duty to provide reasonable accommodation, investigate the extent of the incapacity or injury and consider possible alternatives were also discussed at length in the Supreme Court of Kenya decision *Petition No. 36 of 2019 Simon Gitau Gichuru v Package Insurance Brokers Ltd* where the Supreme Court made pronouncements as follows:

"The respondent ought to have considered the report or even in the least conducted its own investigation as to the appellant's medical condition. We find justification in the South African decision in Standard Bank of South Africa v Commission for Conciliation, Mediation and 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'."

Duty to avoid discrimination

Article 27 of the Constitution of Kenya, 2010 provides for the constitutional right to equality and freedom from discrimination. A similar right is provided for under the new Persons with Disabilities Act 4 of 2025 which provides that every person with disability is has the right to effective legal protection against discrimination on all grounds.

The Employment Act, Cap 226 (Employment Act) of the Laws of Kenya requires employers to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

A new era of employer accountability regarding mental health in the workplace

CONTINUED



An employer's duties...continued

Taking necessary measures to accelerate or achieve equality and eliminate discrimination against persons with disability is not considered to be discrimination.

In the AWW judgment, the court held that the employer's failure to demonstrate that it tried to accommodate the employee amounted to indirect discrimination due to differential treatment.

Although the employer allowed the employee to attend medical treatment which was part of the medical scheme, there was no indication that it went out of the way to accommodate her. Further, there was no evidence that investigations were conducted on all other employees during that period and hence the employee was subjected to different treatment which emanated from the employee's disability.

Fair disciplinary procedures must consider mental health

The Employment Act requires employers to explain to the employee the reason for which the employer is considering termination before terminating them and the employee shall be entitled to have another employee or a shop floor union representative of their choice present during this explanation.

According to the judgment, subjecting a mentally incapacitated employee to disciplinary proceedings without accommodating their mental condition is inconsiderate and results in an unfair hearing. For a hearing to be fair, the employee must have a healthy state of mind to comprehend proceedings and defend themselves. The employer should ensure the employee has proper representation during disciplinary processes, especially when mental capacity is impaired.

A new era of employer accountability regarding mental health in the workplace

CONTINUED



Government action promoting mental health

These judicial pronouncements are also now reinforced by important legislative reforms undertaken by the Government, most notably the Mental Health (Amendment) Act, 2022 (Mental Health Act) and the National Guidelines on Workplace Mental Wellness, 2023 (Guidelines).

While the Mental Health Act does not expressly refer to employees, it significantly strengthens the legal environment in which they operate by affirming and expanding the rights of persons with mental illness, many of whom are in employment. The act guarantees the right to dignity, non-discrimination, medical care and reintegration into social and economic life and places clear obligations on both national and county Governments to ensure these rights are upheld. It also prohibits exploitative labour practices and mandates fair access to medical insurance for mental health treatment.

In this way, the Mental Health Act functions as a powerful rights-based benchmark against which an employer's conduct can be assessed, especially when read together with Article 43 of the Constitution guaranteeing the right to health, Article 27 on the right to equality and freedom from discrimination, and the Employment Act which prohibits unfair labour practices. Courts, as seen in this case, are already interpreting these combined frameworks to impose enforceable duties on employers, including the duty to reasonably accommodate mental illness in the workplace and to adjust internal processes accordingly.

The Government's commitment to mental wellness in the workplace is further articulated in the Guidelines issued by the Ministry of Health. The Guidelines provide a detailed and structured roadmap for employers to develop mentally healthy workplaces. They frame mental wellness not only as a health issue but also as a legal and economic imperative.

Although framed as policy, the Guidelines are aligned with the Constitution and the Mental Health Act and are increasingly viewed as a standard of expected conduct particularly for larger or formal sector employers. They call on employers to establish workplace mental wellness programmes, appoint wellness committees, develop policies, offer support mechanisms and create inclusive, non-discriminatory environments. These are presented not as optional good practices but as core elements of a responsible and lawful employment framework.

**EMPLOYMENT LAW
ALERT**

A new era of employer accountability regarding mental health in the workplace

CONTINUED



Conclusion

This case significantly advances Kenyan employment law regarding mental health in the workplace by establishing clear employer obligations towards employees with mental health conditions. Employers must go beyond merely providing medical treatment and must make reasonable accommodations in the workplace itself, investigate mental incapacity before dismissal and ensure fair processes that account for an employee's mental state.

Additionally, failure to adhere to these principles is no longer just a reputational risk, it may now result in significant legal and financial liability, as seen in this case. Ultimately, these legal and policy developments reflect a broader societal shift that mental health is no longer a private concern or a soft human resources issue. It is a matter of public interest, national productivity and enforceable law.

**Njeri Wagacha, Arnold Mutisya,
Christine Mugenyu and Serah Mulatya**

Cliffe Dekker Hofmeyr

Legal500**2025
KENYA****TIER 3**
Employment

OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:

**Aadil Patel**

Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

**Anli Bezuidenhout**

Director:
Employment Law
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

**Fiona Leppan**

Director:
Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

**Imraan Mahomed**

Director:
Employment Law
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

**Nadeem Mahomed**

Director:
Employment Law
T +27 (0)11 562 1936
E nadeem.mahomed@cdhlegal.com

**Yvonne Mkefa**

Director:
Employment Law
T +27 (0)21 481 6315
E yvonne.mkefa@cdhlegal.com

**Phetheni Nkuna**

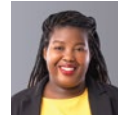
Director:
Employment Law
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com

**Desmond Odhiambo**

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

**Njeri Wagacha**

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

**Jean Ewang**

Counsel:
Employment Law
T +27 (0)11 562 1499
E jean.ewang@cdhlegal.com

**Thabang Rapuleng**

Counsel:
Employment Law
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

**JJ van der Walt**

Counsel:
Employment Law
T +27 (0)11 562 1289
E jj.vanderwalt@cdhlegal.com

**Ebrahim Patelia**

Legal Consultant:
Employment Law
T +27 (0)11 562 1000
E ebrahim.patel@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa, Kenya and Namibia, please contact:

**Daniel Kiragu**

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E daniel.kiragu@cdhlegal.com

**Malesela Letwaba**

Senior Associate:
Employment Law
T +27 (0)11 562 1710
E malesela.letwaba@cdhlegal.com

**Lee Masuku**

Senior Associate:
Employment Law
T +27 (0)11 562 1213
E lee.masuku@cdhlegal.com

**Leila Moosa**

Senior Associate:
Employment Law
T +27 (0)21 481 6318
E leila.moosa@cdhlegal.com

**Christine Mugenyu**

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E christine.mugenyu@cdhlegal.com

**Arnold Mutisya**

Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E anold.mutisya@cdhlegal.com

**Kgodisho Phashe**

Senior Associate:
Employment Law
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com

**Taryn York**

Senior Associate:
Employment Law
T +27 (0)11 562 1732
E taryn.york@cdhlegal.com

**Chantell De Gouveia**

Associate:
Employment Law
T +27 (0)11 562 1343
E chantell.degouveia@cdhlegal.com

**Ayesha Karjieker**

Associate:
Employment Law
T +27 (0)11 562 1568
E ayesha.karjieker@cdhlegal.com

**Biron Madisa**

Associate:
Employment Law
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com

**Lynsey Foot**

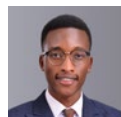
Associate:
Employment Law
T +27 (0)11 562 1429
E lynsey.foot@cdhlegal.com

**Shemonné Isaacs**

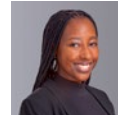
Associate:
Employment Law
T +27 (0)11 562 1831
E shemonne.isaacs@cdhlegal.com

**Thobeka Kalipa**

Associate:
Employment Law
T +27 (0)11 562 1238
E thobeka.kalipa@cdhlegal.com

**Kevin Kipchirchir**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E kevin.kipchirchir@cdhlegal.com

**Thato Makoaba**

Associate:
Employment Law
T +27 (0)11 562 1659
E thato.makoaba@cdhlegal.com

**Thato Maruapula**

Associate:
Employment Law
T +27 (0)11 562 1774
E thato.maruapula@cdhlegal.com

**Sheilla Mokaya**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sheilla.mokaya@cdhlegal.com

**Serah Mulatya**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E serah.mulatya@cdhlegal.com

**Sashin Naidoo**

Associate:
Employment Law
T +27 (0)11 562 1482
E sashin.aidoo@cdhlegal.com

**Billy Oloo**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E billy.oloo@cdhlegal.com

**Melisa Wekesa**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E melisa.wekesa@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

NAMIBIA

1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2025 14845/JUL

