

CHAPTER 2

A CRITICAL ANALYSIS OF THE DUTY TO PROVIDE REASONABLE ACCOMMODATION FOR EMPLOYEES WITH PSYCHOSOCIAL CONDITIONS AS AN EMPLOYMENT ANTI-DISCRIMINATION OBLIGATION: A CASE STUDY OF KENYA'S LEGAL FRAMEWORK

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Summary

This article examines whether Kenya adequately protects employees with psychosocial conditions from discrimination, specifically the unjustified denial of reasonable accommodation by an employer. To determine this, it will consider the rights of employees with psychosocial disabilities in employment and the concomitant duties that are imposed on state parties and employers when it comes to the provision of reasonable accommodation under the UN Convention on the Rights of Persons with Disabilities (CRPD). Thereafter, the national disability anti-discrimination legal framework in Kenya that protects employees with psychosocial conditions from discrimination in employment will be discussed, looking specifically at the denial of reasonable accommodation as a form of discrimination. To begin with, it will delve into the place of the CRPD under Kenyan law, as this is necessary in order to understand when and how the CRPD applies under Kenya's law, and the resulting legal implications. Besides that, the Constitution and specific anti-discrimination legislation that provides legal responses to an employee with psychosocial disabilities who is denied reasonable accommodation in employment will be critically analysed. Finally, the article evaluates whether the available legal framework provides adequate protection to persons with psychosocial disabilities from discrimination in employment.

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1 Introduction

In 2017 the World Health Organisation (WHO) estimated that one in five people at the workplace experience a psychosocial condition (mental health condition or mental illness),¹ worldwide.² According to growing evidence worldwide, mental illness is a major contributor to the burden of disease and disability.³ Five of the ten leading causes of disability are mental health conditions.⁴

Mental ill health is a universal phenomenon that cuts across different social and cultural divides.⁵ It is as relevant in high-income countries as it is in low-income countries.⁶ Although mental health has become a national health priority in some countries, it is still an overlooked issue in most African countries.⁷ In fact, 64 per cent of African countries do not have any mental health legislation or fail to adequately promote the rights of persons with mental illnesses.⁸ In Kenya, the rights of persons with psychosocial conditions are often ignored or given little attention. This is fuelled by the misconceptions people have about such conditions.

One in 20 Kenyans would prefer to take their family member with a psychosocial condition to a faith healer or medicine man rather than seeking medical intervention.⁹ This is fuelled by the fact that psychosocial conditions are believed to be as a result of a familial defect or witchcraft.¹⁰

- 1 Psychosocial conditions refer to mental health conditions that trigger legal protection, regardless of whether they qualify as disabilities or not. Further, for the purposes of this research they include mental health conditions that are recognised clinically in one of, or both the American Psychiatric Association's Diagnostic and Statistical Manual 5th Edition (DSM V) and the 11th Revision of the WHO's *International classification of diseases* (ICD-11). See American Psychiatric Association *Diagnostic and statistical manual of mental disorders* (2013); World Health Organisation *International classification of diseases* 11 ed (2019). While ICD-11 was adopted in 2019, it only came into effect on 1 January 2022.
- 2 PAHO & WHO 'World Mental Health Day, 10 October 2017: Mental Health in the workplace' (2017) https://www.paho.org/hq/index.php?option=com_content&view=article&id=13739%3Aworld-mental-health-day-2017&catid=9485%3Amental-health-day&Itemid=42130&lang=en (accessed 9 October 2022).
- 3 G Harnois & P Gabriel 'Mental health and work: Impact, issues and good practices' (2000) 1.
- 4 As above.
- 5 D Bhugra et al 'The future of Psychiatry Commission – Authors' reply' (2018) 5 *The Lancet Psychiatry* 775; N Drew et al 'Human rights violations of people with mental and psychosocial disabilities: An unresolved global crisis' (2011) 378 *The Lancet* 1664.
- 6 K Mathias et al 'Multiple barriers to participation for people with psychosocial disability in Dehradun district, North India: A cross-sectional study' (2018) 8 *BMJ Open* 1.
- 7 GCE Obame 'Developing mental health laws in Ghana, Kenya, and Zambia' (2017) 15 *Columbia Social Work Review* 1.
- 8 As above.
- 9 Obame (n 7) 39.
- 10 Kenya National Commission on Human Rights 'Silenced minds: The systematic neglect of the mental health system in Kenya: A human rights audit of the mental health system in Kenya' (November 2011) 38 http://www.knchr.org/Portals/0/EcosocReports/THE_%20MENTAL_HEALTH_REPORT.pdf (accessed 8 October 2022).

Many are also of the view that persons who self-identify or are diagnosed with mental health conditions as a result of alcohol or substance abuse are responsible for their own illness.¹¹ Besides that, there is not only a lack of awareness on mental health, but deep-rooted stigma and discrimination against persons with mental illness.¹² Consequently, persons with psychosocial conditions are assumed to be less competent and unable to live productive lives.¹³

Notably, the most current national survey was in 2019 and it found that Kenya has a national disability rate of 2.2 per cent.¹⁴ However, it failed to capture psychosocial disabilities as a disability category.¹⁵ A 2017 WHO report on the 'prevalence of depression and anxiety disorders in Africa estimated that Kenya had 1.9 million persons who are clinically depressed', which constitutes 4.4 per cent of the total population.¹⁶ It also indicated that there are '1.3 million cases of anxiety disorders', which constituted 3.1 per cent of the total population at the end of 2016.¹⁷ Worth noting, however, is that it is common for mental health cases to go unreported and undiagnosed, thus such figures give just a glimpse of the prevalence of mental health conditions in Kenya.¹⁸

There is no available accurate data on the employment of persons with psychosocial disabilities in Kenya.¹⁹ As a result, it is not possible to get a

11 As above.

12 As above.

13 As above.

14 It adopted the Washington Group short set of questions on disability in data collection. Questions on the six domains of disability (visual, hearing, mobility, cognition, selfcare and communication) were asked of persons aged five years and above while that of albinism was administered to everyone. See Kenya National Bureau of Statistics '2019 Kenya Population and Housing Census Volume IV: Distribution of Population by Socio-Economic Characteristics' (February 2020) 12 and 394; E Owino 'Status of disability in Kenya: Statistics from the 2019 census' (6 May 2020) 1.

15 As above.

16 World Health Organisation 'Depression and other common mental disorders: Global health estimates' (2017) 17 http://www.who.int/mental_health/management/depression/prevalence_global_health_estimates/en/ (accessed 20 May 2022).

17 As above.

18 M Mwoka 'Mental health in Kenya: The unspoken agenda global health' *Next Generation Network* 7 November 2017 <http://ghnetwork.org/article/mental-health-in-kenya-the-unspoken-agenda> (accessed 26 May 2022).

19 Psychosocial disability will be used to refer to psychosocial conditions which qualify as a disability according to the definition of disability provided within relevant anti-discrimination legal frameworks. Notably, The CRPD's reference to 'mental' impairment in art 1 includes persons with psychosocial disabilities. Although psychosocial disability can and has been used interchangeably with mental disability, the preferred terminology is 'persons with psychosocial disabilities' – in line with the social model of disability and the recognition that disability is an evolving concept in line with the preambular paragraph (e) of the CRPD. See W Holness 'The invisible employee: Reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32 *South African Journal on Human Rights* 510; G Szmukler, R Daw & F Callard 'Mental health law and the UN Convention on the rights of persons with disabilities' (2014) 37 *International Journal of Law and Psychiatry* 245; T Minkowitz 'Abolishing mental health laws to comply with the Convention on the Rights of Persons with Disabilities' in B McSherry & P Weller (eds) *Rethinking rights-based mental health laws* (2010) 154. Notably, not all psychosocial conditions qualify as a disability.

holistic view of the prevalence of psychosocial conditions in Kenya, or of access to and maintenance of employment. Statistics on disability are not always available and this is part of the overall challenges of planning, implementing and monitoring mental health and anti-discrimination policies.

Further, mental health challenges impact workplaces through increasing absenteeism, reduced productivity, and increased healthcare costs.²⁰ Many mental health conditions may affect the cognitive functioning of an affected person. These include: attention, concentration, memory, reasoning, and the problem-solving ability of affected persons.²¹ The comparative difficulties psychosocial ill health presents in terms of expectations of conduct and accommodation needs, means that employers must be creative in order to find solutions for accommodating persons with psychosocial conditions.²² Many employers are not willing or able to rise to this challenge.

Disclosure of a psychosocial disability is not usually met with empathy and support by employers and colleagues.²³ There is often a lack of understanding, ignorance, stigma and prejudice.²⁴ Employees with mental health conditions may find that once they disclose their conditions or their conditions become known in other ways, 'they experience discrimination from co-workers, feel socially marginalised, have to cope with negative comments from workmates, and have to return to positions of reduced responsibility'.²⁵ In addition, employers often make the assumption that persons with psychosocial disabilities not only require greater supervision, but are untrustworthy, unable to use initiative, and not able to deal appropriately with members of the public.²⁶ As a result of interpersonal and other related social difficulties, persons with psychosocial disabilities are often unable to thrive in and successfully maintain employment.²⁷ Nevertheless, it is worth noting that research suggests that providing reasonable accommodation is an effective and pragmatic means through

20 Holness (n 19) 510.

21 NE Khalema & J Shankar 'Perspectives on employment integration, mental illness and disability, and workplace health' (2014) 2014 *Advances in Public Health* 1.

22 As above.

23 Holness (n 19) 510-511.

24 Holness (n 19) 510-511; S Genga 'The link between the right to live independently and to be included in the community for persons with psychosocial disability, and the right to work and employment: A critical analysis of Kenyan law' (2020) 8 *African Disability Rights Yearbook* 101 at 107.

25 P Schnabel 'Protecting and including vulnerable people in times of economic crisis' in A Baumann & M Muijen (eds) *Mental health and well-being at the workplace – Protection and inclusion in challenging times* (2010) 9.

26 Holness (19) 511.

27 As above.

which support can be offered to help employees with psychosocial conditions maintain employment.²⁸

2 Reasonable accommodation and employees with psychosocial disabilities

Reasonable accommodation duties require different treatment for people whose circumstances are relevantly different, in this case employees with psychosocial disabilities.²⁹ The CRPD defines reasonable accommodation as:

Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.³⁰

This definition makes it clear that accommodations involve the removal of specific disadvantages in order to ensure equality for disabled individuals.³¹ It was

developed to address the issue of impairment and to acknowledge the need of persons with disabilities to be treated in a different way than persons without disabilities in order to make rights 'real' for the former group.³²

However, the concern of reasonable accommodation is not to confer advantage but to remove disadvantage.³³

Importantly, it may be useful to make the distinction between reasonable accommodation and direct discrimination, accessibility and special measures from the outset. Both indirect discrimination and reasonable accommodation are similar in that they both go beyond the demands of formal equality and address the disadvantage which results from apparently neutral requirements and practices. Further, they both 'require recognition of material difference and a corresponding adaption of practice'.³⁴ However, the similarities end there. While indirect discrimination is concerned with the impact on a group of persons in general, reasonable accommodation has to be tailored to suit the needs of

28 D Ferri & A Lawson 'Reasonable accommodation for disabled people in employment: A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway' (2016) 50.

29 As above.

30 Article 2 of the CRPD.

31 Ferri & Lawson (n 28) 48.

32 S Ferraina 'Analysis of the legal meaning of Article 27 of the UN CRPD: Key challenges for adapted work settings' (14 March 2012) 15; Ferri & Lawson (n 28) 48.

33 Ferri & Lawson (n 28) 49.

34 A Lawson *Disability and equality law in Britain* (2008) 186.

a particular disabled person.³⁵ It is also important to differentiate between reasonable accommodation and accessibility. While reasonable accommodation is an individual right with individual implications, accessibility is a group right.³⁶ In addition, while accessibility is an ex-ante duty, the duty to provide reasonable accommodation is an ex-nunc duty.³⁷ That means that accessibility is anticipatory in nature. Basically, it is built into systems and processes without regard to the need of a particular person with a disability, but persons with disability in general.³⁸ In contrast, reasonable accommodation as an ex-nunc duty is only provided from the moment that a person with a disability wants to exercise his or her rights.³⁹ Also, although accessibility duties are required to be implemented gradually, but unconditionally; reasonable accommodation duties, as highlighted above, are immediately realisable, but conditional in the sense that they are subject to the limitation of the ‘undue’ or ‘disproportionate’ burden.⁴⁰

Due to the gradual realisation of accessibility in the built environment, public transportation and information and communication services, reasonable accommodation may be used as a means to provide access to an individual in the meantime, as it is an immediate duty.⁴¹ Furthermore, in some instances, accessibility may be used as a means to remove a barrier, thereby negating the need for individual accommodations.⁴² Nevertheless, it is worth noting that the distinction between accessibility and reasonable accommodation is not always easily made.⁴³

Finally, reasonable accommodation should not be confused with specific measures,⁴⁴ which include affirmative action measures.⁴⁵ Even though both concepts are similar in that they aim at achieving the de facto equality⁴⁶ of persons with disabilities,⁴⁷ reasonable accommodation is a non-discrimination duty, whereas specific measures implies a preferential treatment of persons with disabilities over others to address historic and systemic exclusion from the benefits of exercising rights.⁴⁸ It involves adopting or ‘maintaining certain advantages in favour of an

35 MC du Plessis *Access to work for disabled persons in South Africa: A rights critique* (2017) 100.

36 Ferri & Lawson (n 28) 7.

37 Ferri & Lawson (n 28) 24; para 24 of the CRPD Committee, General Comment 6 (2018), Art 5: Equality and Non-Discrimination, 26 April 2018, UN Doc CRPD/C/GC/6 (2018).

38 As above.

39 As above.

40 Paragraph 42 of General Comment 6; art 2 of the CRPD.

41 As above.

42 Ferri & Lawson (n 28) 49.

43 Ferri & Lawson (n 28) 95 and 96.

44 Article 5(4) of the CRPD.

45 Paragraph 28 of General Comment 6.

46 Ferri & Lawson (n 28) 96.

47 As above.

48 Paragraph 25 of General Comment 6.

underrepresented or marginalised group'.⁴⁹ They can be temporary in nature, or permanent, depending on context and circumstances, including by virtue of a particular impairment or the structural barriers in society.⁵⁰ Examples of positive discrimination include quotas, reduced entry requirements or qualifications, reservations of professions, supported employment,⁵¹ affirmative action measures,⁵² support programmes for students with disabilities in tertiary education,⁵³ targeted recruitment, advancement and empowerment measures, as well as respite care and technological aids.⁵⁴

Similarly, although reasonable accommodation and the provision of support may overlap in some circumstances, they are not synonymous.⁵⁵ Provision of support includes, for example, personal assistants, under the right to live independently and be included in the community,⁵⁶ support to exercise legal capacity,⁵⁷ or 'procedural accommodations' in the context of access to justice.⁵⁸ Further, while reasonable accommodation is limited by the concept of disproportionality, procedural accommodations are not.

Importantly, the most prominent application of the reasonable accommodation requirement remains in the field of work and employment. It is, nevertheless, argued that when developing reasonable accommodation laws and policies, there is a tendency to focus on people with physical or sensory impairments, and persons with psychosocial conditions are often overlooked.⁵⁹ Lawson argues that this is because it requires less imagination to identify the obstacles which standard design or procedure might create for people with physical or sensory impairments.⁶⁰ For example, an employee who cannot see and needs a computer to perform their work can be provided with a Braille computer keyboard. However, the barriers which persons with psychosocial impairments might encounter are far less obvious and not easily identifiable.⁶¹

49 Paragraph 28 of General Comment 6; para 12 of the UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination (2009), 30 April 2018, UN Doc CERD/C/GC/32 (2018).

50 Paragraph 28 of General Comment 6.

51 Paragraph 28 of General Comment 6; Lawson (n 34) 209-212.

52 Paragraph 12 of the General Recommendation 32.

53 Paragraph 25(c) of General Comment 6.

54 Paragraph 28 of General Comment 6.

55 Paragraph 25 of General Comment 6.

56 Ferri & Lawson (n 28) 96.

57 As above.

58 As above.

59 A Lawson 'People with psychosocial impairments or conditions: Reasonable accommodation and the Convention on the Rights of Persons with Disabilities' (2008) 26 *Law in Context: Socio-Legal Journal* 68.

60 As above.

61 As above.

The power of reasonable accommodation is that it is a versatile measure and is just as applicable to persons with psychosocial disabilities.⁶² Examples of reasonable accommodation for persons with psychosocial disabilities include: flexible working hours;⁶³ permission to work from home temporarily;⁶⁴ job transfer within the organisation;⁶⁵ provision for disability leave; allocating duties to another person during periods of incapacity; modifying procedures for pre-employment testing or assessment;⁶⁶ reorganisation or altering of workstations or acquiring new tools;⁶⁷ quiet workspace or provision of equipment like noise-cancelling headphones in order to limit distractions due to sound sensitivity;⁶⁸ conveying tasks via email or in writing – to provide reference where memory is affected;⁶⁹ and provision of frequent breaks due to concentration difficulties.⁷⁰ Looking at the examples above, it is evident that apart from the employer, employee, and expert, the human resources officer will also be required to play a vital role in identifying relevant reasonable accommodation.

Notably, one of the biggest challenges for persons with psychosocial disabilities in claiming reasonable accommodation is not only the unjustified denial by an employer, but the fact that it's a duty that is activated by disclosure by the employee to the duty-bearer, the employer.⁷¹ Necessary accommodations can only be implemented upon disclosure.⁷² Nevertheless, employees often do not disclose their psychosocial conditions or disabilities. This is problematic, as these conditions are often hidden or invisible,⁷³ concealable,⁷⁴ and affected employees' skills and needs are not immediately ascertainable.⁷⁵

Employees with psychosocial disabilities or those who have experienced psychological disabilities in the past, often choose not to disclose their impairment to employers and so forego the opportunity to be reasonably accommodated.⁷⁶ This is fuelled by the fact that persons with psychosocial impairments or conditions belong to one of the most stigmatised groups in society.⁷⁷ This stigma not only leads to fear that

62 As above.

63 Lawson (n 59) 71.

64 As above.

65 Lawson (n 59) 73.

66 Lawson (59) 70.

67 Ferraina (n 32) 16.

68 SA Federation of Mental Health (n 63); Lawson (34) 71.

69 As above.

70 As above.

71 Lawson (n 59) 78; K Vornholt et al 'Disability and employment – Overview and highlights' (2018) 27 *European Journal of Work and Organizational Psychology* 40 at 49.

72 Vornholt et al (n 71) 48-49.

73 Lawson (59) 78.

74 Vornholt (n 71) 48 and 49.

75 Vornholt (n 71) 47.

76 Ferri & Lawson (n 28) 86; Lawson (n 59) 78.

77 Vornholt (n 71) 47.

disclosure will result in rejection or acts of hostility,⁷⁸ but to misguided negative misconceptions about their competence in employment.⁷⁹ Therefore, the reluctance to disclose is, perhaps, unsurprising.⁸⁰ Studies have found that in many workplaces, employees choose to suffer their mental illness in silence, fearing the stigma that comes with disclosure, while employers are uncomfortable around the topic and do not know how to deal with such a disclosure.⁸¹ A recent study conducted in Kenya found that the discrimination and stigma associated with mental illness often prevents disclosure by employees.⁸² Further, according to the study, disclosure during an interview was bound to affect employment opportunities depending on the potential employer's attitude towards psychosocial conditions, and so for most employees non-disclosure was the better option.⁸³ As a result, a potential recruit may choose to disclose the condition only once an offer is made, which then requires an employer to consider possible accommodations. This sequencing is important in order to protect job applicants.⁸⁴

In addition to stigma, another limitation of disclosure by an employee with a psychosocial disability could be facilitated by 'a perception that in requesting reasonable accommodation, one might be setting oneself apart from one's colleagues or asking for special treatment'.⁸⁵ Also, low self-esteem, and the view that it is the individual who must change and not the workplace are also barriers to employees requesting reasonable accommodation.⁸⁶ Whatever the reason for non-disclosure, it creates practical obstacles to persons with psychosocial conditions who require reasonable accommodation in order to access or maintain employment.⁸⁷ The CRPD does not provide any guidance on how to handle confidentiality concerns of employees or applicants with psychosocial conditions or impairments.

As has already been highlighted, employers in Kenya function in a society and community where psychosocial conditions are highly stigmatised.⁸⁸ It is not too farfetched to assume that negative attitudes by

78 Lawson (n 59) 78.

79 Holness (19) 511.

80 Lawson (n 59) 78.

81 A Hamdulay 'Manage mental illness in the workplace: Wellness – Proactive management' (2014) 10 *HR Future*; South African 2015 IDeA (Impact of Depression at Work Audit) Report, which was conducted by SADAG in collaboration with health and economic research organisation Hexor and pharmaceutical company Lundbeck.

82 I Ebuenyi et al 'Employability of persons with mental disability: Understanding lived experiences in Kenya' (2019) 10 *Frontiers in psychiatry* at 2 and 6.

83 Ebuenyi et al (n 82) 6.

84 Holness (n 19) 510 and 511.

85 Lawson (n 59) 79.

86 As above.

87 M Bell et al (European network of legal experts in gender equality and non-discrimination) 'The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States' (2016) 86.

88 As explained in footnote 25 and 26.

employers is common. A study done in Kenya found that disclosure of mental illness resulted in negative reactions from employers, which lead to further stigmatisation and discrimination in the workplace.⁸⁹ Further, 'attitudinal barriers may persist in the face of legal duties',⁹⁰ and that is why one will find that although the legislation in many states provides that employers should employ persons with disabilities, many employers decide against it.⁹¹

It also does not help that employers may have the wrong perception that work accommodations are too costly.⁹² These beliefs remain 'persistent despite studies showing that the majority of accommodations cost little or nothing'.⁹³ Furthermore, it should be mentioned that because of the negative perceptions about disability, any extra cost of employing persons with disabilities in general, no matter its magnitude, can be a disincentive to employers.⁹⁴ Therefore, costs or assumed costs to the employer are a significant limitation to the potential of reasonable accommodation of persons with disabilities.⁹⁵

Markedly, there may be ways in which to subsidise the accommodation costs and to create public-private partnerships to share the financial burden of accommodation.⁹⁶ As an example, Kenya provides tax cuts for employers who reasonably accommodate employees with disabilities specifically, but no such provision exists for employees who may not qualify as disabled. Nevertheless, a recent study done in Kenya found that generally employers are not aware of these tax cuts – none of the employers interviewed in the said study had ever accessed the government tax rebates available for employers of persons with disabilities in Kenya.⁹⁷ Furthermore, the effectiveness of these initiatives is not clear as yet.

89 ID Ebuenyi et al 'Expectations management; employer perspectives on opportunities for improved employment of persons with mental disabilities in Kenya' (2020) 42 *Disability and Rehabilitation* 1687 at 1692.

90 Du Plessis (35) 175.

91 Vornholt et al (71) 47.

92 As Above.

93 Vornholt et al (n 71) 45.

94 MP Opoku et al 'Access to employment in Kenya: The voices of persons with disabilities' (2017) 16 *International Journal on Disability and Human Development* 77.

95 Du Plessis (35) 177.

96 As above.

97 Ebuenyi et al (n 89) 1694.

3 The CRPD and the unjustifiable denial of reasonable accommodation as a form of discrimination

The CRPD is the first human rights treaty to provide that the unjustified failure to provide reasonable accommodation is a distinct form of discrimination.⁹⁸ In other words, the unjustified denial of reasonable accommodation is a separate form of discrimination that does not fall under the heading of direct or indirect discrimination.⁹⁹

Lawson argues that reasonable accommodation has an unusual bridging role.¹⁰⁰ This is because its purpose is to ensure that all rights (both economic, social or cultural rights, and civil and political rights) are meaningfully accessible to persons with disabilities.¹⁰¹ Although discrimination is traditionally a civil and political right, because the CRPD defines denial of reasonable accommodation as a form of discrimination, it now imposes a positive obligation on both state parties and private entities.¹⁰² Reasonable accommodation hence carries both financial and non-financial costs.¹⁰³ As a result, it can be argued that although the CRPD provides that the principle of immediate realisation will apply to civil and political rights, and that of progressive realisation for economic, social and cultural rights, the fact that denial of reasonable accommodation amounts to discrimination creates an obligation of immediate effect despite having financial obligations.¹⁰⁴ Scholars such as Waddington and others¹⁰⁵ argue that because the duty to reasonably accommodate forms part of the non-discrimination norm, it is an obligation that has immediate effect.¹⁰⁶ This is also the position taken by the Committee which makes it clear that reasonable accommodation is an immediate duty.¹⁰⁷ In contrast, Lord and others suggest that the concepts of 'reasonableness' and 'undue burden' serve to introduce some notion of

98 Article 2 of CRPD.

99 L Waddington & A Broderick 'Combatting disability discrimination and realising equality: A comparison of the UN Convention on the Rights of Persons with Disabilities and EU equality and non-discrimination law' (2018) 664.

100 Lawson (n 28) 40.

101 Lawson (n 28) 65.

102 Lawson (n 59) 66; Other civil and political rights that impose positive obligations include art 19 and 20 of CRPD.

103 Lawson (n 59) 64.

104 Equality and non-discrimination are principles and rights. The Convention refers to them in art 3 as principles and in art 5 as rights. They are also an interpretative tool for all the other principles and rights enshrined in the Convention. Promoting equality and tackling discrimination are cross-cutting obligations that require immediate realisation. See para 12 of General Comment 6.

105 Waddington & Broderick (n 99) 40.

106 Waddington & Broderick et al (n 99) 40; Lawson (59) 64.

107 Paragraph 42 of General Comment 6.

progressive realisation into the realm of non-discrimination.¹⁰⁸ I agree with Lawson and Waddington and others that reasonable accommodation is an immediate obligation, even though the parameters of the obligation may be circumscribed by concepts such as reasonableness and ‘disproportionate or undue burden’.

Article 5(3) of the CRPD requires state parties to take all appropriate steps to ensure that reasonable accommodation is provided.¹⁰⁹ State parties must ensure that their anti-discrimination legislation provides for the denial of reasonable accommodation as a form of discrimination.¹¹⁰ Accordingly, state parties are obligated to identify barriers and consider how those obstacles might be removed in order for employees with psychosocial disabilities to thrive in the workplace.¹¹¹ Furthermore, such legislation must obligate both public and private sector employers to provide reasonable accommodation to individual employees with disabilities.¹¹²

The process of an employer reasonably accommodating an employee with a psychosocial disability should begin with dialogue, as both parties should consult in order to help identify and remove barriers.¹¹³ Further, the duty to provide reasonable accommodation is not limited to disclosure and a preceding request for accommodation by an employee,¹¹⁴ but applies also where a potential duty bearer, the employer, should have realised that the person in question had a disability that might require accommodations.¹¹⁵ Notably, the changes required by reasonable accommodation carry both financial and non-financial costs.¹¹⁶

The employer should ensure that the accommodation is not only feasible (legally or in practice),¹¹⁷ but that it is also relevant and effective in facilitating the realisation of the right in question.¹¹⁸ Persons with disabilities moreover should not bear the costs.¹¹⁹ Notably, the term ‘reasonable’ has been debated, as some state parties have interpreted the

108 JE Lord et al ‘The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities’ in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 280.

109 Article 4(b) and (c); M Fasciglione ‘Article 27 of the CRPD and the right of inclusive employment of people with autism’ in V D Fina et al (eds) *Protecting the rights of people with autism in the fields of education and employment: International, European and national perspectives* (2015) 150; Ferri & Lawson (n 28) 8; L Waddington & Broderick (n 99) 40.

110 Articles 2 and 5(3); Fasciglione (109) 150; J Clifford ‘The UN Disability Convention and its impact on European equality law’ (2011) 6 *The Equal Rights Review* 11 at 14.

111 Lawson (59) 66 and 67; Ferri & Lawson (28) 48 and 49.

112 Fasciglione (109) 15.

113 Paragraph 26(a) of General Comment 6.

114 Paragraph 24 of General Comment 6.

115 As above.

116 Lawson (59) 64; para 26(a) of General Comment 6.

117 Para 26(b) of General Comment 6.

118 Para 26(c) of General Comment 6.

119 Para 26(d) and (f) of General Comment 6.

term 'reasonable' to refer to an accommodation which does not result in excessive costs or challenges for the employer, while others relate the term to the quality of the accommodation, meaning that the accommodation must be effective in facilitating an individual with a disability to carry out the relevant employment duties.¹²⁰

The Committee has emphasised that 'reasonable accommodation' is a single term, and that 'reasonable' is not an exception clause to the duty.¹²¹ Hence, reasonableness should not be used to assess the costs of accommodation or the availability of resources as this occurs at a later stage, when the disproportionate or undue burden assessment is undertaken.¹²² The 'reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability'.¹²³ An accommodation is reasonable, therefore, if it achieves the individual purpose (or purposes) for the person with a disability for which it is being made.¹²⁴ An accommodation may, however, be reasonable, while still posing a 'disproportionate or undue burden' on a duty bearer.

Notably, 'disproportionate or undue burden' should be understood as a single concept that sets the limit of the duty to provide reasonable accommodation. According to the Committee, both terms should be considered synonyms as they demand for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party.¹²⁵ Notably, Lawson and others raise concern about the phrase 'undue burden'. They argue that it may construe persons with disabilities as 'burdens' on the community.¹²⁶ In line with this, a general misconception by employers is that reasonable accommodation is too costly or difficult to provide.¹²⁷ Lawson, in contrast, argues that because article 2 places a heavy emphasis on the concepts of reasonableness and proportionality,¹²⁸ the CRPD puts more weight on the impact of making

120 Fasciglione (109) 150.

121 The Committee is made up of 12 independent experts, and they monitor implementation of the CRPD by the state parties and have the legal authority to issue General Comments that elaborate on the meaning of the provisions of the CRPD or cross-cutting themes. See art 34 of the CRPD; United Nations Human Rights Office of the High Commissioner 'Committee on the Rights of Persons with Disabilities' <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/committee-on-the-rights-of-persons-with-disabilities-3.html> (accessed 11 October 2022); para 25 of General Comment 6.

122 As above.

123 As above.

124 Paragraph 25 of General Comment 6. See *HMV Sweden CRPD/C/7/D/3/2011*. In this case the Committee in determining whether denial of reasonable accommodation amounts to discrimination, adopted a two-prong test. The first step is to identify whether the accommodation is effective in meeting the needs of the individual with the disability and the second is to determine whether the accommodation imposed a disproportionate burden on the responsible entity.

125 Paragraph 25(b) of General Comment 6.

126 Lawson (59) 64.

127 Paragraph 25 of General Comment 6.

128 Lawson (59) 64.

the relevant modification in the workplace, and not necessarily on absolute figures as the central issue.¹²⁹

The Committee provides that the determination of whether a reasonable accommodation is disproportionate or imposes an undue burden, requires an assessment of the proportional relationship between the means employed and its aim, which is the enjoyment of the right concerned.¹³⁰ Potential factors to be considered include financial costs, the size of the accommodating party, the potential effect of the accommodation on the accommodating party, third-party benefits, negative impacts on other persons and reasonable health and safety requirements.¹³¹ Thus, it is not only financial factors that should be considered, but also social factors.¹³² This is because

many proposed steps will carry net benefits rather than burdens for duty-bearers – in addition to the benefit of securing the custom or employment of the particular individual, benefits might flow from measures such as the introduction of a system or structure that will improve accessibility and thereby increase the organisation's future employees that may require similar infrastructure.¹³³

Notably, when it comes to changes that require financial cost, the reasonableness of bearing a particular cost will depend on the circumstances of the duty-bearer in question (in this case the employer).¹³⁴ According to the Committee, this requires the consideration of the circumstances of the state party as a whole and the private sector entity, overall assets rather than just the resources of a unit or department within an organisational structure in order to make a determination.¹³⁵ This is because what amounts to a disproportionate hardship for a small business may not be so for large and well-resourced organisations.¹³⁶ Hence, a case-by-case approach should be adopted in determining 'disproportionate or undue burden'.

Importantly, the determination of disproportionate or undue burden also includes consultations between the employer and the person with a disability.¹³⁷ This is because the burden of proof rests with the duty bearer who claims that his or her burden would be disproportionate or undue.¹³⁸ In *HM v Sweden*¹³⁹ it was found that the state parties had not produced evidence to indicate that reasonably accommodating the author would

129 As above.

130 Paragraph 26(d) of General Comment 6.

131 Paragraph 26(d) and (e) of General Comment 6.

132 Ferri & Lawson (28) 50.

133 As above.

134 Lawson (59) 64.

135 Paragraph 26(d) and (e) of General Comment 6.

136 Lawson (n 59) 64; Ferri & Lawson (n 28) 50.

137 Paragraph 26 of General Comment 6.

138 Paragraph 26(d) and (g) of General Comment 6.

139 *HM v Sweden* CRPD/C/7/D/3/2011.

impose a disproportionate or undue burden. The Committee found that because Sweden's Planning and Building Act allowed for departure from the development plan, it could thus reasonably accommodate the author, and thus her request would not impose a disproportionate or undue burden on the state party.¹⁴⁰

Importantly, the Committee states that state parties enjoy a margin of discretion in the formulation of reasonable accommodation duties, especially in their decisions of when a burden should be regarded as a disproportionate or undue burden.¹⁴¹ This position was reiterated in the case of *Jungelin v Sweden*.¹⁴² The majority of the Committee in this case affirmed that when it comes to assessing the reasonableness and proportionality of accommodation measures, state parties 'enjoy a certain margin of appreciation'.¹⁴³ State authorities have an intimate knowledge of their country and are thus better placed to interpret what a right means in a certain context when weighing competing public and individual interests.¹⁴⁴ However, the Committee did not hold that state parties enjoy an unlimited margin, but that the Committee would respect the decision if the domestic courts used an objective criterion in reaching its decision.¹⁴⁵ It did instead emphasise that it was generally for the courts of state parties to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.¹⁴⁶ Notably, this decision (the decision by the Committee's majority) has been criticised for not being sufficiently radical in promoting equality and considering the effects of their decision.¹⁴⁷ Indeed, five Committee members issued a joint dissenting opinion and one Committee member partially concurred with the joint dissenting opinion.

The joint dissenting opinion found that despite state parties enjoying a certain margin of freedom when assessing undue burden in the determination of reasonable accommodation, the Committee should have still reviewed the criteria that were used by the state party in this particular case.¹⁴⁸ The dissenting view highlighted the fact that the domestic court should have considered the potential impact of the alternative measures on the future employment of other persons with visual impairments as an additional positive criterion. Thus, the benefit to future employees must also be taken into account. Thus, in the determination of 'disproportionate or undue burden', apart from only looking at the impact on the individual

140 Para 8.5.

141 Ferri & Lawson (n 28) 50.

142 *Marie-Louise Jungelin v Sweden* CRPD/C/12/D/5/2011.

143 *Marie-Louise Jungelin v Sweden* para 10.4.

144 I Mggijima-Konopi 'Regional developments: The jurisprudence of the Committee on the Rights of Persons with Disabilities and its implications for Africa' (2016) 4 *African Disability Rights Yearbook* 269 at 279.

145 As above.

146 *Marie-Louise Jungelin v Sweden* para 10.4.

147 Holness (n 19) 523.

148 *Marie-Louise Jungelin v Sweden* para 10.4.

seeking the reasonable accommodation, the effects of denying such accommodation to others who may be similarly affected in the future should also be considered.¹⁴⁹

Holness argues that the dissenting members' opinion should be commended for considering a more robust substantive equality approach to reasonable accommodation, which considered the impact of systemic discrimination in the given employment situation, and thus moved closer to a transformative approach to equality.¹⁵⁰ I agree that the inclusion of social impact and not only financial cost is a more holistic approach to equality.

The Committee has also noted that apart from the limitation of disproportionate or undue burden, the denial of reasonable accommodation can be justified based on objective criteria.¹⁵¹ According to the Committee: it must be communicated in a timely fashion to the person with a disability concerned¹⁵² and the justification test should be determined based on the length of the relationship between the duty bearer and the rights holder.¹⁵³ The implication is that unlike indirect discrimination, an employer can justify denying an employee with a disability reasonable accommodation but only within the parameters provided above.

4 Kenyan legal framework

According to the Kenyan anti-discrimination legal framework, an employee with psychosocial conditions can bring a discrimination claim on a number of grounds: disability or health status under the Constitution,¹⁵⁴ disability under the Persons with Disabilities Act,¹⁵⁵ and/or disability or mental status under the Employment Act.¹⁵⁶ Further, the provisions that list the protected grounds in the Constitution,¹⁵⁷ and the Employment Act¹⁵⁸ imply that the lists of grounds are open, so an employee with a psychosocial condition could also bring a discrimination claim under an unspecified ground. The legal consequences of an employee with a psychosocial condition claiming discrimination under each health status, mental status or unspecified ground is beyond the scope

149 Holness (n 19) 524.

150 As above.

151 Paragraph 27 of the General Comment 6.

152 As above.

153 As above.

154 Article 27(4).

155 Section 15(1).

156 Section 5(3)(a).

157 Article 27(4) of Constitution of Kenya, 2010.

158 Employment Act Cap 226 11 of 2007 sec 5(3)(a).

of this paper as the focus is employees with psychosocial conditions who qualify as person with disabilities.¹⁵⁹

Further, in Kenya, the courts will only recognise an individual as a person with a disability if they are registered under the National Council for Persons with Disabilities (NCPWD).¹⁶⁰ This has been upheld in a number of cases, including *Suleman Angolo v Executive Officer Teachers Service Commission*¹⁶¹ and *Stephen Kariuki Kama v Kenya Ports Authority*,¹⁶² *Juliet Mwangeli Muema v Smollan Kenya Limited*,¹⁶³ and *Fredrick Gitau Kimani v Attorney General*.¹⁶⁴ In *Esau Rodgers Mumia v Central Bank of Kenya*,¹⁶⁵ the court ruled that one only becomes certified as a person with a disability for purposes of accessing the rights and privileges under the Persons with Disabilities Act after they are registered by the NCPWD in terms of section 7(1)(c) of the PWD Act.¹⁶⁶ For an employee to access the benefits of disability set out in law, their disability must be certified through registration by the NCPWD, relying on duly completed medical reports.¹⁶⁷ Therefore, employees with psychosocial conditions cannot claim anti-discrimination protection as persons with disabilities under Kenyan law unless they are first registered as a person with a disability by the NCPWD.

The Kenyan anti-discrimination legal framework provides both constitutional and statutory safeguards that protect employees with psychosocial conditions against discrimination in employment. Admittedly, under the Kenyan legal framework, an employee with a psychosocial condition who is discriminated against can bring a discrimination claim under the Constitution,¹⁶⁸ Persons with Disabilities Act,¹⁶⁹ Employment Act,¹⁷⁰ and the CRPD.¹⁷¹ It has been argued that the most significant and transformative development in Kenya in respect of

159 Disability is defined in art 260 of the Constitution, sec 2 of the Persons with Disabilities Act, and sec 2 of the Employment Act.

160 Section 7(1)(c) of the Persons with Disabilities Act.

161 [2015] eKLR, Constitutional Petition 12 of 2014 para 11.

162 [2016] eKLR, Constitutional Petition 21 of 2016 para 47.

163 [2019] eKLR, Cause 104 of 2017.

164 [2012] eKLR, Petition 157 of 2011.

165 [2017] eKLR, Cause 940 of 2014.

166 *Esau Rodgers Mumia* (n 165) para 18.

167 *Esau Rodgers Mumia* (n 165) para 21.

168 Constitution of Kenya, 2010.

169 Act 14 of 2003.

170 Employment Act Cap 226 no 11 of 2007.

171 Article 2(6) makes Kenya a monist state incorporating ratified treaties into Kenyan laws automatically, without the necessity of a domesticating statute, thus indicating a shift from the former dualist approach to a monist approach. Kenya ratified the CRPD on 5 May 2008. Additionally, Kenya submitted its State Report to the CRPD Committee on the implementation of the Convention. The next report is due in 2022 but has not been published yet. Global Disability Rights Now 'Formal Operation of the CRPD in Kenya' <http://www.globaldisabilityrightsnow.org/law/kenyacrpdc> (accessed 26 April 2022); UN Treaty Body Database 'Reporting status for Kenya' https://tbinter.net.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN (accessed 28 July 2014); NW Orago 'The 2010 Kenyan Constitution and

equality was the adoption of the Constitution on 27 August 2010.¹⁷² It replaced both the 1969 Constitution and the former colonial Constitution of 1963, and has brought major improvements to the legal and policy framework with regards to discrimination. It has a strong focus on equality, a much-improved right to non-discrimination with special provisions for the protection of rights for particular vulnerable groups that include persons with disabilities.¹⁷³ This strong commitment to the principles of equality and non-discrimination is evidenced throughout the Constitution.¹⁷⁴ It is worth noting that both the Persons with Disabilities Act and the Employment Act were enacted prior to the promulgation of the 2010 Constitution,¹⁷⁵ and before the CRPD came into force, and as such are both currently under review.¹⁷⁶

The Employment Act, which was passed in 2007, declares and defines the fundamental rights of employees in order to provide basic conditions of employment.¹⁷⁷ However, persons with psychosocial disabilities who are not protected by the Employment Act¹⁷⁸ may have recourse in terms of the Persons with Disabilities Act and the Constitution.

The Persons with Disabilities Act, which was enacted in 2003,¹⁷⁹ was the first Kenyan law that specifically protected persons with disabilities from discrimination.¹⁸⁰ The aim of the Act is to provide for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, and to establish the National Development Fund for Persons with Disabilities in order to provide

the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 2 *African Human Rights Law Journal* 415 at 419; E Kamundia 'The UN Convention on the Rights of Persons with Disabilities in practice: A comparative analysis of the role of courts in Kenya' in L. Waddington & A. Lawson (ed) *The UN Convention on the Rights of Persons with Disabilities in practice: A comparative analysis of the role of courts* (2013) 288; T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *The Comparative and International Law Journal of Southern Africa* 293; *Karen Njeri Kandie v Alssane Ba* [2015] eKLR Civil Appeal 20 of 2013.

172 The Equal Rights Trust in Partnership with Kenyan Human Rights Commission 'In the spirit of Harambee: Addressing discrimination and inequality in Kenya' ERT Country Report Series: 1 London (February 2012) 170.

173 W Mutunga 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (2015) 1 *Speculum Juris* 1 at 6; The Equal Rights Trust in Partnership with KHRC (n 172) 170.

174 The Preamble, art 10(2)(b); art 20(4)(b); art 54.

175 Persons with Disabilities Act in 2003, and Employment Act Cap 226 no 11 of 2007.

176 Persons with Disabilities (Amendment) Bill, 2019; The Employment Act (Amendment) Bill, 2019; E Kamundia 'Country Report: Kenya' (2014) 2 *African Disability Rights Yearbook* 190.

177 Employment Act Cap 226, No 11 of 2007.

178 They may not qualify as 'employees' as provided for in sec 2 of the Employment Act, or are excluded because they work for the armed forces or police, the National Youth Service; or is in a family undertaking where an employer and the employer's dependants are the only employees or Export Processing Zone. See, further, sec 3(2) and 3(5) of the Employment Act.

179 Revised Edition 2012 [2003] Chapter 133.

180 The Equal Rights Trust in Partnership with KHRC (n 172) 170.

monetary assistance to organisations and persons with disabilities.¹⁸¹ Hence, this Act provides protection specifically for employees with psychosocial conditions who qualify as disabled.

What it is evident from case law is that discrimination claims may be brought in terms of one or more relevant laws. In *Antony Kipkorir Sang v Attorney General*,¹⁸² for example, a case involving disability discrimination in employment, the claim was brought under sections 27(4), 28, 29, 41(1) and 2(b) and 54(1) of the Constitution,¹⁸³ section 15 of the Persons with Disabilities Act as well as article 1 of the CRPD.¹⁸⁴ In *Duncan Otieno Waga v Attorney General*,¹⁸⁵ an employment discrimination claim based on disability was brought under the PWD Act (sections 15 and 22) and the Universal Declaration of Human Rights (UDHR) in article 1. In *Paul Pkiach Anupa v Attorney General*¹⁸⁶ an employment discrimination case was brought under articles 27(4), 41(1) and (2)(b) and 54(1) of the Constitution, section 15 of the Persons with Disabilities Act and section 5(3)(a) of the Employment Act.¹⁸⁷

It is worth noting that neither the Constitution, nor the Employment Act or the Persons with Disabilities Act explicitly provides that the unjustifiable denial of reasonable accommodation constitutes a form of discrimination. Only the Persons with Disabilities Act refers to reasonable accommodation, but not as an anti-discrimination duty.

The Persons with Disabilities Act prohibits disability discrimination based on accommodation in employment.¹⁸⁸ One could argue that this means that the denial of reasonable accommodation amounts to discrimination based on this; however, there is no definition of what amounts to 'accommodations' or any case law in support of this argument. Further, the same Act requires employers to reasonably accommodate persons with disabilities through the provision of facilities and modifications as may reasonably be required.¹⁸⁹ It does not go on to specify what modifications should be made. This is left to the interpretation of the court. The Act also does not delve into much detail about what the duty entails. Further, the use of the words 'reasonably as required' act as a limitation of the right as it waters down the effect of this section.

181 Persons with Disabilities Act.

182 *Kipkorir Sang v Attorney General* [2014] eKLR, Cause 2408 of 2012.

183 *Kipkorir Sang* (182) para 4.

184 *Kipkorir Sang* (182) para 5.

185 [2014] eKLR, Cause 2408 of 2012 paras b, d, and a.

186 [2012] eKLR, High Court Petition 93 of 2011.

187 *Paul Pkiach Anupa* (n 186) 16.

188 Section 15(1).

189 Section 15(5).

Furthermore, the Persons with Disabilities Act also provides tax incentives for employers who reasonably accommodate persons with disabilities in the workplace. It provides that private employers who improve or modify their physical facilities or avail special services in order to provide reasonable accommodation for employees with disabilities, are entitled to apply for additional deductions from their net taxable income equivalent to 50 per cent of the direct costs of the improvements, modifications or special services.¹⁹⁰

Notably, as has been highlighted above, the Persons with Disabilities Act is currently under review. A 2019 Persons with Disabilities Bill has not been passed into law. Although the Bill is subject to change between now and when it is passed into law, importantly, it adopts a more detailed definition of reasonable accommodation that is similar to the definition adopted by the CRPD in article 2.¹⁹¹ However, the Bill does not provide that the unjustified denial of reasonable accommodation amounts to discrimination.

Nevertheless, despite the fact that the Constitution, the Persons with Disabilities Act and the Employment Act do not address the question as to whether the denial of unjustified reasonable accommodation is a form of discrimination, an employee with a psychosocial condition who is registered as having a disability can directly claim discrimination based on article 2 of the CRPD.¹⁹² Article 2 of the CRPD will easily be applicable because there is no provision in the Constitution, the Employment Act or the Persons with Disabilities Act which is contradictory or in conflict with the denial of reasonable accommodation being a form of discrimination. Indeed, there is a gap and article 2 of the CRPD applies. This is evident in a variety of cases. In *Antony Kipkorir Sang v Attorney General*,¹⁹³ that dealt with disability-based discrimination, the court, citing the CRPD¹⁹⁴ found that the retirement on medical grounds of the claimant police officer with a disability, which was as a result of being shot while on duty, instead of reasonably accommodating him constituted discrimination.¹⁹⁵ Similar decisions were taken in *Duncan Otieno Waga v Attorney General*,¹⁹⁶ *Paul Pkiach Anupa v Attorney General*,¹⁹⁷ and *Juliet Mwangeli Muema v Smollan Kenya Limited*.¹⁹⁸

Similar to the CRPD, an employee's right to reasonable accommodation may be limited if it leads to undue burden for the

190 Section 16(2).

191 Persons with Disabilities (Amendment) Bill, 2019, sec 2.

192 *Kipkorir Sang* (n 182) para 49.

193 [2014] eKLR, Cause 2408 of 2012.

194 *Kipkorir Sang* (n 193) 58

195 *Kipkorir Sang* (n 193) paras 1, 20, 43,57 and 58.

196 *Duncan Otieno Waga v Attorney General* [2014] eKLR Cause 89 of 2013, Industrial Court.

197 *Paul Pkiach Anupa v Attorney General* [2012] eKLR, High Court, Petition 93 of 2011, the High Court of Kenya at paras 15 and 52.

198 [2019] eKLR, Cause 104 of 2017. Court findings at para 2; judgment at paras 1 and 4.

employer. In the case of *Juliet Mwangeli Muema v Smollan Kenya Limited*,¹⁹⁹ although the respondent alleged financial hardship, the court found that it was merely alleged before the court, but was not demonstrated at all.²⁰⁰ Accordingly, the court found that there would be no significant financial constraints or hardship imposed on the employer if they reasonably accommodated the claimant.²⁰¹ In another case concerning the police, the court was of the view that the police service possesses the economic power, facilities and logistics for accommodating the claimant who had a disability, and that by assigning the claimant alternative duties the police service would not have suffered any undue hardship or prejudice.²⁰² Correspondingly, in the case of *Gichuru v Package Insurance Brokers Ltd*²⁰³ the respondent had requested the appellant, who had returned to work after a spinal cord surgery in India, to proceed on sick leave until he would be able to move around the office unaided. The respondent later suspended him before taking action to dismiss him from employment, and the Supreme Court subsequently found the respondent as having indirectly discriminated against the appellant. The Supreme Court noted that the respondent failed to demonstrate that there would have been any undue hardship had they chosen 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.²⁰⁴ Further, it was held that the respondent had failed to demonstrate what measures they had taken to accommodate the appellant's condition.²⁰⁵ Basically, the respondent failed to demonstrate how they would endure an undue burden if they in fact accommodated the appellant. Additionally, apart from the CRPD which provides for a limitation to the right to reasonably accommodate an employee, section 15(2)(c) of the Persons with Disabilities Act also provides a limitation.

As has been highlighted above, reasonable accommodation may require employers to incur costs, which employers are expected to bear.²⁰⁶ Ngwena argues that the privatisation of redistribution means that accommodation will be heavily conditional on the resources the employer has at its disposal relative to the expense required to reasonably accommodate an employee with a disability.²⁰⁷ As a result, even when employers are willing to hire and accommodate persons with disabilities, it is too costly.²⁰⁸ Further, although large business entities may not be

199 [2019] eKLR, Cause 104 of 2017.

200 *Juliet Mwangeli Muema* (para 199) court findings at para 2.

201 As above.

202 *Kipkorir Sang* (n 182) para 63.

203 (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment).

204 Para 71.

205 As above.

206 Opoku et al (n 94) 10.

207 CG Ngwena 'Disabled people and the search for equality in the workplace: An appraisal of equality models from a comparative perspective' LLD thesis, University of the Free State, 2010 at 500.

208 Vornholt et al (n 71) 40 at 47.

affected by cost of reasonably accommodating employees with disability, the same cannot be said of small scale businesses.²⁰⁹ Hence, employees are faced with the predicament of whether to fulfil the requirements of reasonable accommodation for persons with disabilities on the one hand and ensuring productivity and profit on the other.²¹⁰ This is especially significant in low-income countries such as Kenya, where there is mass unemployment, no incentives for employers, and a large pool of labour force from which employers can easily employ.²¹¹ It does not help that Committee has been split on how far employers can be expected to go to provide reasonable accommodation and leaves this to state parties to clarify,²¹² and this lack of clarity by the Committee has led to the Kenyan courts having to rely on a more unclear limitations set out in the Persons with Disabilities Act.

The Persons with Disabilities Act in section 15(2)(c) does provide a limitation to the obligation of an employer to provide reasonable accommodation. It provides that an employer will not have discriminated against a person with disability if special facilities or modifications which are required at the workplace to accommodate the person with a disability are such that the employer cannot 'reasonably be expected to provide'. The wording of this section is vague and wide. It is not clear what factors or even how to determine when an employer is not 'reasonably expected to accommodate an employee' with disability, and as a result it can provide employers with a legal excuse not to accommodate employees with disabilities. This was highlighted in the case of *Macharia v Safaricom Plc*.²¹³

In *Macharia v Safaricom Plc* the respondent, Safaricom PLC, failed to integrate its customer service platform with the necessary software to enable the petitioner, Mr Wilson Macharia, who is visually impaired, to complete the technical part of the employment interview, and further used the lack of software as the reason not to employ him. This is despite shortlisting him and inviting him for the interview, and repeatedly promising from the very beginning that they would make the software available and were in fact in the process of installing it.²¹⁴ The court held that the respondent had shown that in order to accommodate the petitioner the respondent would be required to have a spare software and hence special facilities or modifications would be necessary at the work place to accommodate the petitioner as a person with visual disability, and that making such adjustments and technological incorporations, was not viable in that short run due to budgeting constraints.²¹⁵ How this conclusion was

209 Opoku et al (n 94) 10.

210 Ebuanyi et al (n 89).

211 Opoku et al (n 94) 10.

212 *Marie-Louise Jungelin v Sweden* para 10.4.

213 (Petition 434 of 2019) [2021] KEHC 462 (KLR) (Constitutional and Human Rights) (8 July 2021) (Judgment).

214 *Macharia* (n 213) paras 3-11 and 46.

215 *Macharia* (n 213) para 49.

made by the court is not clarified. Further, relying on section 15(2)(c) of the Persons with Disabilities Act, the court found that the respondent could not have been reasonably expected to provide software due to budgetary constraints, and hence the respondent had not discriminated against the petitioner. Notably, in determining whether Safaricom Ltd would suffer an undue burden, it is not clarified whether the court took into account its size as a company. Safaricom is the largest telecommunications provider in Kenya, and one of the most profitable companies in the East and Central Africa region.²¹⁶ It is in fact, the region's highest-ranking company in East Africa in 2022.²¹⁷ The court also did not seem to look at non-financial factors like third-party benefits, or the potential effect of the of the accommodation on the accommodating party, or the negative impacts on other persons and reasonable health and safety requirements. All suggestions by the Committee as factors to be considered in the determination of an undue burden for an employer.²¹⁸ Further, how the court in this case determined that the employer could not be reasonably expected to accommodate Mr Macharia, is not clear. What is evident is that the court relied on section 15(2)(c) of the Persons with Disabilities Act which is vague. This is an area that requires further development and clarification.

Importantly, although the above cases do not deal with employees with psychosocial disabilities specifically, it provides key insight into how Kenyan courts deal with the denial of reasonable accommodation as an anti-discriminatory duty. Even so, it is important to note that according to the law and case law this right to claim anti-discrimination protection for the unjustified denial of reasonable accommodation directly under article 2 of the CRPD is only available to employees with psychosocial conditions who are registered as persons with disabilities. However, employees with psychosocial conditions who do not qualify and instead fall under the protected grounds of mental status or health status, or unspecified grounds are excluded with no recourse. This is not in compliance with the CRPD.

5 Conclusion

The current Kenyan legal framework does not provide adequate anti-discrimination protection for employees with psychosocial conditions who may be denied reasonable accommodation by their employers. Although employees with psychosocial conditions who qualify and are registered as persons with disability may not be able to make a discrimination claim if they are denied reasonable accommodation by an employer under the

216 IPA 'Safaricom' <https://www.poverty-action.org/organization/safaricom> (accessed 8 October 2022).

217 T Minney 'Safaricom leads ranking of East Africa's Top 20 companies' *African Business* 27 April 2022 <https://african.business/2022/04/finance-services/top-companies-east-africa/> (accessed 8 October 2022).

218 Paras 26(d) and (e) of General Comment 6.

Persons with Disabilities Act or Employment Act, they may still claim in terms of article 2 of the CRPD directly. However, this duty to reasonably accommodate an employee specifically applies only to employees with psychosocial conditions who qualify as persons with disabilities and are registered as persons with disabilities and claim protection under other protected grounds like health status, mental status or unspecified grounds. As a result, a recommendation is that Kenya's employment anti-discrimination law should be amended to recognise the unjustified denial of reasonable accommodation as a form of discrimination in relation to all protected grounds, not just disability, in order to adequately protect employees with psychosocial conditions from discrimination in employment.