



Akamah v Board of Management Awasi Catholic Mission Hospital (Appeal E035 of 2025) [2025] KEELRC 2952 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2952 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E035 OF 2025
JK GAKERI, J
OCTOBER 29, 2025

BETWEEN

PEREZ ATIENO AKAMAH APPELLANT

AND

**BOARD OF MANAGEMENT AWASI CATHOLIC MISSION
HOSPITAL RESPONDENT**

JUDGMENT

1. This is an appeal from the Judgment of Hon. Edina Nyaboke Angima delivered on 28th May, 2024 at Nyando Magistrate’s Court in Perez Atieno Akamah V Board of Management St. Mary’s Awasi Catholic Mission Hospital MCELRC No. E004/2024.
2. A brief background to the case is that the appellant alleged that she was an employee of the respondent from 1st August, 2023 to 13th February, 2024 serving as Locum Nurse and her employment was unfairly terminated by the respondent without any reason or compliance with the procedures as provided by law.
3. The appellant sought a declaration that termination of her employment was unfair, salary in lieu of notice, 12 months compensation, salary arrears for November, December 2023, January and February 2024, over time total Kshs.559,615.00, KRA P9, Certificate of service, costs, interest and any other relief the court deemed just to grant.
4. When the matter came up for hearing on 16th October, 2024, Peace Ogotu, who was holding brief for Mr. Nyamweya for the respondent sought time for Mr. Nyamweya to come on record and leave was granted and a mention slated for 18th December, 2024 when both counsels were present.
5. The trial court directed that the matter be mentioned on 12th March 2025 to confirm compliance when only the appellant’s advocate was present and sought a date for formal proof, which the court slated for 16th April, 2025 when formal proof took place.



The respondent neither entered appearance nor defended the suit.

6. The appellant merely adopted her witness statement dated 12th April, 2024 and produced her exhibits 1 – 5.
7. After careful consideration of the materials placed before her, the learned trial magistrate found and held that the appellant was not an employee of the respondent and dismissed the suit for want of proof. This is the Judgment appealed against.
8. The appellant faults the trial court on six (6) grounds which the court condenses into two namely: failing to consider, evaluate, analyse and apply the oral and documentary evidence on record and failing to consider the appellant's written submissions.
9. The appellant prays that the Judgment and decree of the trial court be set aside and the appellant's claim before the trial court allowed in its entirety with costs.

Appellant's submissions

10. As to whether the appellant was an employee of the respondent, counsel reproduced the appellant's evidence, that the appellant was earning Kshs.1,000 per day and had an average salary of 25,000.00 per month and her employment was pursuant to an oral agreement.
11. Reliance was placed on the provisions of Section 9(2) and 10(7) of the *Employment Act* on the duty of the employer to draw up the employment contract and prove or disprove terms alleged by the employee.
12. Decisions in *Edward Isedia Mukasia V Eldo Supermarket Ltd* [2015] eKLR and *Peter Ngunjiri Kariuki V Board of Management Magomano Secondary School* [2022] eKLR were relied upon on the import of Section 10(7) of the Act, to urge the court to find that the appellant was the respondent's employee as at 13th February 2024.
13. Concerning unfair termination, counsel contended that the trial did not make a finding as to whether termination of employment was unfair or not.
14. Reliance was placed on *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR, *Postal Corporation of Kenya V Andrew K Tanui* [2019] eKLR and *Gilbert Mariera Makori V Equity Bank Ltd* [2016] eKLR among others on the essence of the provisions of Section 41, 43, 45(2) and 47(5) of the *Employment Act* in the termination of an employment contract as regards procedural fairness.
15. On substantive fairness, reliance was placed on *Joseph Kiprotich Bett V Kenya Commercial Bank* [2014] eKLR and *John Jaoko Othino V Intrahealth International* [2022] eKLR.
16. Finally, on reliefs, counsel submitted that the appellant was entitled to all the relief prayed for at the trial court including over time and costs.

Respondent's submissions

17. In submissions in opposition to the instant appeal, counsel for the respondent submitted that the learned trial magistrate applied the provisions of Section 47(5) of the *Employment Act* correctly and found that the appellant had failed to prove that she was in the employment of the respondent at the date of the alleged termination of employment.
18. Reliance was placed on the decisions in *Kennedy Nyagundi V University of Nairobi* [2018] eKLR, and *Elizabeth Washeke & 62 Others V Airtel Networks (K) Ltd & another* [2013] eKLR to submit that



the appellant failed to prove on a balance of probabilities that she was an employee of the respondent in accord with the provisions of Section 108 of the *Evidence Act*.

19. On the appellant's contention that her submissions were not considered by the trial court, reliance was placed on the sentiments of the Court of Appeal in *Kenya Ports Authority V Kutson (Kenya) Ltd [2009] 2EA 212* for the proposition that a court was not bound to reproduce submissions made before it as long as the judgment demonstrates that the court considered the evidence and relevant law.
20. Counsel urged that the Record of appeal showed that the trial court analysed the exhibits and evidence before it.
21. Reliance was further placed on the sentiments of the court in *Nairobi Aviation College V Esther Wanjiru Mwangi [2019] eKLR* on the centrality of proof of the employment relationship between the parties and *Co-operative Bank of Kenya V Banking, Insurance & Finance Union (Kenya) [2017] eKLR* on instances in which an appeal court may interfere with a finding of fact made by the trial court.
22. Finally, counsel submitted that the appeal was devoid of merit and was for dismissal.

Analysis and determination

23. This being a first appeal the role of the first appellate court is has been exquisitely captured in legions of decision.
24. In *Gitobu Imanyara & 2 others V Attorney General [2016] eKLR* the Court of Appeal stated:

“An appeal to this court from a trial by the ... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect”.
25. See also *Selle & another V Associated Motor Boat Co. Ltd [1968] EA 123*, *Peters V Sunday Post [1958] EA 424*, *Kenya Ports Authority V Kutson (Kenya) Ltd [2009] EA 212*, *Mwanasokoni V Kenya Bus Services Ltd [1985] KLR 931* among others.
26. As adverted to elsewhere in this judgment the appellant's bone of contention is primarily that the learned trial magistrate failed to consider evaluate, analyse and judicially apply the appellant's oral and written evidence.
27. This court is enjoined to reconsider and re-evaluate the evidence on record and it is not necessarily bound by the findings of the trial court.
28. The first issue for the court's determination is whether the learned trial magistrate failed to consider, evaluate and apply the evidence before the court.
29. In her written statement dated 12th April, 2024 the appellant stated that she was employed by the respondent on 1st August, 2023 as a locum nurse at Kshs.25,000 per month, at Kshs.1,000 per day and served diligently until termination on 13th February, 2024.
30. She further stated that her salary for November and December 2023 was not paid as was the salary for January and February 2024.
31. It was her evidence that she worked from 8:00am to 6:00pm. The appellant appears to have been paid for August, September, and October 2023, but adduced no evidence to that effect.



32. Strangely, the written statement was silent as to how the alleged termination of employment took place and the steps the claimant took.
33. The appellant's viva voce evidence did not alter, vary or add to the written statement or the documents on record which I now proceed to.
34. The first piece of evidence was the appellant's national identity card number 29409744 issued in November 2017. The card bears the appellant's name and a picture.
35. The 2nd document was a provisional NSSF statement in the appellant's name showing that she was an employee of the Independent Electoral and Boundaries Commission (I.E.B.C) when she registered as a member of the NSSF in August 2017.
36. However, contributions were only made in 2017 and another year which is unclear, possibly 2018, Kshs.400 and 200 and only for the month of August.
This document was of no evidential value to the appellant's case.
37. The 3rd document was the appellant's bank statement. The name of the bank is unclear. The statement is for the months of November 2023 to January 2024 and reveals that on 23rd November 2023, the appellant received the sum of Kshs.23,578.00 and a further Kshs.15,325.05 on 24th January, 2024 from the respondent.
38. No other payment was reflected. This statement shows that the appellant had a contractual relationship with the respondent and the consideration provided by the respondent for the services the appellant rendered was a salary.
39. It is also discernible that the salary was paid around 23rd and 24th of the month.
40. This statement does not show or create the impression that the appellant was employed in August 2023 or rendered any services and was paid for them.
41. For unexplained reasons, the appellant did not avail her bank statements prior to November 2023 which would have conclusively established when she commenced rendering services to the respondent.
42. The 4th document was entitled Awasi Mission Maternity Rota August 2023 and bears the name "Peres" not Perez. It is unclear to the court what the letters E, N and O denotes on the rota and the appellant's witness statement was of no assistance, a fact the trial court adverted to.
43. It cannot be over-emphasized that it is the cardinal duty of the party relying on any document or exhibit to make it understandable and usable as evidence in court. Unclear documents and unexplained abbreviations are of no use to the court.
44. The rota does not show that the appellant was employed on 1st August, 2023.
45. It shows that the appellant was on the respondent's duty rota for that month only.
46. Rotas for subsequent months would have established continuity in the relationship. This is because the appellant was being paid per hour as alleged.
47. The principles that govern undefended suits or where the respondent fails to attend a hearing well settled.
48. Even though the claimant's evidence remain uncontroverted, the claimant is still required to prove his/her case to the required threshold.



The party suing must establish the allegations made.

49. In *Monica Kanini Mutua V Al-Arafat Shopping Centre & another* [2018] eKLR cited by Maureen Onyango J in *Humphrey Munyithia Mutemi V Soluxe International Group of Hotels and Lodges Ltd* [2020] eKLR the court held.

“...in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of employment”.

50. Abuodha J expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* [2016] eKLR.

“The burden of proof does not become anyless on the employee simply because the employer has not defended the claim or absent at the trial. The claimant must still prove his or her case. It is not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour”.

51. Similarly, in *Mbogo V Settlement Land Trustees* [2025] KECA 561 (KLR), the Court of Appeal held:

“...It is necessary for parties to know that even in an undefended suit, the burden of proof is not lowered. The only advantage to a party in such a suit is that the evidence remains uncontroverted but it must nevertheless prove that claim as pleaded”. See also *Karugi & another V Kabiya & 3 others* [1983] KECA 38 (KLR) where Hancox JA stated:

“...The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”

Plat Ag. JA expressed similar sentiments.

52. In the instant case, the appellant bore the burden to prove his case on a balance of probabilities.
53. Documents on record show that the appellant had a relationship with the respondent in August 2023 as well as November 2023 and January 2024. The appellant availed no shred of evidence to prove that she rendered any services in September, October 2023 and December 2023 and/or was not paid or that her salary was Kshs.25,000 per month as the only two month’s when a salary was paid, the amount varied and in the case of January 2024, the appellant adduced no evidence to prove that the amount paid was less than her entitlement and was claiming salary for all the months including November 2023 and January 2024 when her bank statement shows that she was paid.
54. The bank statement was an important piece of evidence because it showed that the appellant rendered services to the respondent and was paid a salary for that month and was thus not a casual employee by virtue of the provisions of Section 37 of the *Employment Act*.
55. The totality of the evidence before the court reveals that the appellant was an employee of the respondent but does not appear to have rendered services continuously, which would have been reflected in the NSSF or NHIF statement or the KRA P9 form. The latter ought to have been availed for purposes of filing of tax returns.



56. This far the court is satisfied that the trial court fell into error by failing to critically analyse the documentary evidence on record and in particular, the import of the bank statement which clearly showed that the appellant was not a casual employee.
57. However, the trial court cannot be faulted for having failed to consider the appellant's viva voce evidence, which in the court's view was deficient in many respects. Such as with whom she agreed to render services to the respondent and why she did not insist on a written arrangement and rendered no evidence of having been paid in August, September and October 2023 but was claiming the salary for November yet she was paid. The viva voce evidence ought to have explained the appellant's case clearly to justify the prayers made.
58. The last issue for determination relates to the alleged termination of employment by the respondent.
59. The appellant alleged that her employment was terminated by the Administrator, one Sister Victoria Orwa on 13th February, 2024.
60. Puzzlingly, the written witness statement was silent on how the termination of employment took place. Particulars of what transpired on that day were necessary for contextual purposes, such as was the appellant on duty on that day, was it morning or afternoon, night where was it? In the administration office, ward or along the corridor or boardroom. What did Sister Victoria Orwa do and what did the appellant do?
61. Such particulars renders the party's evidence more credible as opposed to a mere allegation.
62. Relatedly, the appellant adduced no evidence of having appealed the alleged termination of employment or returned to the work place for her dues and only sought legal advice on 21st March, 2024.
63. The law requires the employee to evidentiary demonstrate that there was a termination of employment and that it was unfair.
- Section 47(5) of the *Employment Act* provides:
64. 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.
65. This provision has been construed to mean that the employee must evidentiary demonstrate a prima facie case of unfair termination of employment or wrongful dismissal, after which the burden shifts to the employer to demonstrate that it was justifiable.
66. In *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd (supra)* Abuodha J stated:
- “This burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The claimant must still prove his or her case. It is not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour”.
67. The foregoing comments apply with equal force to the circumstances of the instance the case.
68. The appellant alleged that she was unfairly terminated from employment by one sister Victoria Orwa but the alleged termination of employment lacked any supportive evidence be it oral or written.



69. A mere statement that an unfair termination of employment has taken place on a particular date is not sufficient evidence that indeed an unfair termination of employment occurred on that day. The event must be evidentiary demonstrated.
70. In the instant case, the appellant did not provide sufficient evidence to show that the respondent terminated her employment unfairly or unlawfully.
71. As regards failure to consider the appellant's submissions, on paragraph 6 of the Judgment delivered on 28th May, 2025, the learned trial magistrate stated that she had carefully considered the submissions in making the determination and did not have reproduce them in the Judgment. With such an explicit statement in the Judgment of the court, this court is not persuaded that the trial court did not consider the submissions by counsel.
72. Instructively, in *Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & another* [2014] KECA 642 (KLR) the Court of Appeal addressed the issues of submissions as follows:

“Submissions cannot take the place of evidence... submissions are generally parties’ ‘marketing language’ each side endeavouring to convince the court that its case is the better one. Submissions we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented...”

The court is guided accordingly.

73. Be that as it may, submissions by counsel pray a significant role in litigation. It accords counsels an opportunity to present their respective cases and urge them in light of the relevant principles and provisions of law. It also gives the court an opportunity to perceive the case from the insights and perspectives of counsel which enriches decision making.
- The court did not fall into error on this issue.
74. On salary arrears, and as adverted to elsewhere in this judgment the salary for November 2023 was paid and is thus not due. Similarly, salary for January 2024 was paid and no claim for any balance was made. The same is not due.
75. The only salary due to the appellant is for December 2023 and 13 days for February 2024 which translates to Kshs.25,000 for December 2023.
76. Since the appellant did not testify that she worked for the respondent without rest days and 13th February, 2024 was a Tuesday the sum payable was Kshs.11,000 for 11 days.
- Total Kshs.36,000.00
77. As regards overtime, Kshs.134,615.00 since August 2023, the appellant tendered no evidence as to whether she and the respondent had agreed to pay overtime, as well as how it was claimed and paid and why it had not been claimed since August 2023. The absence of these particulars renders the claim unproven and thus unmerited.
78. It is not the duty of this court to order or direct employers to issue the Kenya Revenue Authority (KRA) P9 forms to their employees annually. All matters relating to tax and filing of tax returns is the domain of the Kenya Revenue Authority, which has a board which is mandated to over administration of the *Income Tax Act*.



79. Under Section 51(1) of the *Employment Act* an employer is obligated to issue a certificate of service to every employee who leaves service provided the employee rendered services continuously at least four (4) consecutive weeks.
80. The appellant qualified and ought to have been issued with Certificate of service and the respondent is required to comply with the provisions of Section 51 of the *Employment Act*.
81. Guided by the principles enunciated in *Mbogo & another V Shah* [1968] EA 93, and the sentiments of *Madan JA in United India Insurance Co. Ltd & 2 others V East African Underwriters (Kenya) Ltd* [1985] E. A. 898, relied upon in legions of decisions such as *Mrao Ltd V First American Bank of Kenya & 2 others* [2003] KLR 125 and *Fluer Investment Ltd V Commissioner of Domestic Taxes & another* [2018] KECA 341 (KLR), the court is satisfied that a case has been made for interference with the exercise of discretion by the trial court.
82. Consequently, the appeal is partially successful and the judgment of the trial court dated 28th May, 2025 is set aside in its entirety and in its place an award of Kshs.36,000.00 being the salary for December 2023 and 11 days in February 2024.

All other claims were unmerited.

Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 29TH DAY OF OCTOBER 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

