



REPUBLIC OF KENYA



Owiti v Board of Management St Mary's Awasi Catholic Mission Hospital (Appeal E038 of 2025) [2025] KEELRC 2931 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2931 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E038 OF 2025
JK GAKERI, J
OCTOBER 29, 2025**

BETWEEN

CAROLINE ADONGO OWITI APPELLANT

AND

**BOARD OF MANAGEMENT ST.MARY'S AWASI CATHOLIC MISSION
HOSPITAL RESPONDENT**

JUDGMENT

1. This is an appeal from the Judgment of Hon. Edina Nyaboke Angima SPM in Nyando MCELRC No. E003/2024 Caroline Adongo Owiti V Board of Management St. Marys Wasi Catholic Mission Hospital, dated 28th May, 2025.
2. The appellant's case before the trial court was that she was employed by the respondent as a nurse on or about 1st February, 200 at Kshs.8,000.00 which had risen to Kshs.16,541.00 by 2016 and the contract was renewed on 1st September, 2022 and renewed based on satisfactory performance, and served diligently.
3. It was the appellant's case that the Respondent's Administrator, one Victoria Orwa terminated her employment on 13th February, 2024 without reason or justification.
4. The appellant prayed for a declaration that termination of employment was unfair unprocedural and unlawful, the sum of Kshs.2,175,229.46 being salary in lieu of notice, salary arrears for June, November and December 2023 and January and February 2024, overtime Kshs.1,664,611, service pay Kshs.219,486.00, KRA P9 Forms 2010 – 2023, Certificate of service costs, interest and any other relief the court deemed fit to grant.
5. The respondent neither entered appearance nor defend the suit.



6. After considering the appellant's case and submissions dated 28th April, 2025, the learned trial magistrate found that the appellant had not availed evidence to prove that her employment contract was renewed after expiry on 30/08/2023 and was thus not an employee on 13th February, 2023 and her employment was not terminated by the respondent.
7. The court directed the respondent to issue a Certificate of service and KRA P9 Forms as prayed for. This is the judgment appealed against.
8. The appellant faults the judgment of the trial court on five (5) grounds, that the court failed to:
 1. Consider the appellant's viva voce and documentary evidence of her employment.
 2. Consider the applicants written submissions.
 3. Properly examine the evidence on record in relations to the prayers sought.
 4. Apply itself judicially and/or adequately evaluate the evidence and submission on record.
 5. Apply the viva voce and documentary evidence tendered by the appellant and the law.

Appellant's submissions

9. 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 the employment contract and prove or disapprove terms alleged by the employee.
10. Decisions in Edward Isedia Mukasia V Eldo Supermarket Ltd [2015] eKLR and Peter Ngunjin Kanuki V Board of Management Magumano Secondary School [2022] eKLR were relied upon on the import of Section 10(7) of the [Employment Act](#), to urge the court to find that the appellant was the respondent's employee as at 13th February 2024.
12. Concerning unfair termination, counsel contended that the trial court did not make a finding so as to whether termination of employment was unfair or not.
13. Reliance was placed on Pius Machafu Isindu V Lavington Security Guard 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 termination of an employment contract as regards procedural fairness.
14. On substantive fairness, reliance was placed on the decisions in Joseph Kiprotich Bett V Kenya Commercial Bank [2014] eKLR and John Jaoko Othino V Intrahealth International [2022] eKLR.
15. Finally, on reliefs, counsel submitted that the appellant was entitled to all the reliefs played for at the trial court including over time and costs.

Respondent's submissions

16. Counsel submitted that trial court correctly applied the provisions of Section 47(5) of the [Employment Act](#) on the initial burden of proof by the employee and found that the employment relationship lapsed on 30th August 2025 without a renewal.
17. Reliance was placed on Bernard Wanjohi Muriuki V Kirinyaga Water & Sanitation Co. Ltd [2012] eKLR on fixed term contracts where a renewal had not been made and the employee continued working.



18. That the appellant failed to establish any employment relationship with the respondent after 30th August 2023.
19. On submissions, reliance was placed on the sentiments of the Court of Appeal in Daniel Toroitich Arap Moi Mwangi Stephen Muriithi [2014] eKLR to urge that submissions were not evidence.
20. Finally, counsel submitted that the appellant had failed to prove that her employment was unlawfully terminated by the respondent.

Analysis and determination

21. This being a first appeal the duty of the court is essentially to reconsider, re-evaluate and re-analyse the evidence on record and determine whether the findings and conclusions arrived at by the trial court can stand or not.

22. In Kenya Ports Authority V Kutson (Kenya) Ltd [2009] 2 EA 212, the Court of Appeal stated:

On a first appeal ...the court... should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not extraneous matters not dealt with by the parties in the evidence”.

23. The grounds of appeal itemised by the appellant may, in the court’s view be condensed into two, namely; failure to consider and apply the evidence on record wholesomely and failure to consider and apply the appellant’s submissions.

With regard to the evidence on record, the court proceeds as follows.

The appellant availed copies of five (5) documents.

24. The national identify card identified the appellant as Caroline Adongo Owiti and had a photograph of her face.

25. The second document was a letter of renewal of the appellant’s contract of service dated 1st September, 2022. The renewal was effective 1st September, 2022 to 30th August, 2023 a duration of one (1) year, at a monthly salary of Kshs.16,541.60, 21 leave days, one month’s salary at the end of the contract and 10% annual increment of basic salary based on satisfactory performance.

The appellant signed the contract on even dated.

26. The 3rd document was provisional National Social Security Fund (NSSF) statement dated 26th February, 2024 for the duration 1st January, 2016 to 30th June, 2023 and contributions had been remitted up to 30th June, 2023.

The employer was identified as Awasi Mission Health Centre.

27. The fourth document was the appellants Equity Bank of Kenya statement from 1st January, 2012 to 31st December 2016.

28. Strangely, the last salary was deposited on 3rd August 2015, Kshs.240,00.00.

29. The last document is the advocates demand letter dated 22nd March, 2024, demanding Kshs.886,153.85



30. The foregoing documents comprises the documentary evidence availed by the appellant before the trial court.
31. On 16th April, 2025 the appellant adopted the witness statement as evidence in chief and produced the above mentioned exhibits.
32. It is notable that contrary to the appellant's allegation that she was employed by the respondent as a nurse, the only copy of the contract of employment on record shows that she was employed as a Nurse aid, which was also reflected in her monthly salary.
33. Equally, the appellant tendered no evidence of having been employed in or about 1st February, 2010.
34. The bank statement had no transactions before 15th November, 2013 and the appellant did not allege that her remuneration was being paid otherwise than through her bank account. In addition NSSF contributions commenced in 2016 when the appellant registered as a member of the National Social Security Fund.
35. Significantly, the appellant availed a copy of renewal of her contract of service dated 1st September, 2022 for one (1) year but though stating that the contract of service was renewed based on satisfactory performance, the written witness statement indicated neither the renewal date nor the duration of the contract of service.
36. Equally, the appellant adduced no shred of evidence to establish that she remained in the respondents employment after 30th August, 2023 as the learned trial magistrate found.
37. The trial court found that the absence of evidence of renewal of the contract of service after 30th August, 2023 was corroborated by the provisional NSSF statements as no contributions were remitted after June 2023 as opposed to July, 2023.
38. In a similar vein, the copies of bank statements provided by the appellant showed that she received a salary in October 2014, 12th January 2014, 5th May, 2015, 17th May, 2015 and 3rd August 2015 only. It is unclear to the court what happened to salary payment after August 2015.
39. From the evidence on record, it is clear that the appellant's contract of service for one (1) year ended on 30th August, 2023 and she adduced no verifiable evidence to show that the contract of service was renewed in writing or by word of mouth, on what terms and for what duration.
40. Without such evidence, the court would have no basis to find or hold that the appellant's employment subsisted until 13th February, 2024 when it was purportedly terminated by the respondents Administrator, one Victoria Orwa.
41. In the court's view, the trial court cannot be faulted for having arrived at the decision that the appellant was not an employee of the respondent after 30th August, 2023.
42. The trial court's finding was consistent with the evidence availed by the appellant.
43. Apart from stating that the fixed term contract 'was renewed based on satisfactory performance, a statement lacking in particulars of the purported renewal, as demonstrated later in this Judgment the appellant failed to discharge the burden of proof on a balance of probabilities as by law required.
44. The provisions of the [Evidence Act](#) are clear on the burden of proof.
45. It is trite law that the operative mantra is who alleges is required to establish the attendant allegations.
46. Section 107 of the [Evidence Act](#) provides:



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
47. Under Section 109 of the *Evidence Act*
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
48. See in this regard, *Palace Investment Ltd V Godfrey Kariuki Mwenda & another* [2015] eKLR, *Miller V Minister of Pensions* [1947] 2 ALLER 372, *Ignatius Makau Mutisya V Reuben Musyoki Muli KECA* 612 (KLR), *Kirugi & another V Kabiya & 3 others* [1987] KLR 347, *Blue Shield Insurance Co. Ltd V Samuel Nyaga Naurukiri* [2008] eKLR, *Mary Wambui Kabugu v Kenya Bus Service Ltd* [1997] eKLR.
49. In the instant case, the appellant bore the burden of proof, to establish that her contract of service was indeed extended after 30th August 2023 and that she remained in employment until the contract of employment was terminated by the respondent.
50. The statement in the witness statement reproduced elsewhere in this judgment was not sufficient evidence of the fact that the contract of service was renewed for any duration or for how long it subsisted. These facts were unproved.
51. Concerning the failure of the trial court to consider and apply the appellant’s submissions, the court is not persuaded that that was the case.
52. In the impugned judgment, the learned trial magistrate expressly acknowledged that the appellant filed submissions and the court carefully considered them in making its determination but did not see the need to reproduce them in the judgment.
53. No doubt submissions play an important role in decision making and typically give the court counsel’s appreciation of evidence and relevant law, perspectives and insights which the court could rely on to buttress its decision.
54. However, in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] KECA 642 (KLR), the Court of Appeal expressed the view that:
- 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...”
55. The trial court cannot be faulted on the issue of having failed to consider submissions.
56. On the alleged unfair termination of the appellant’s employment by the respondent’s Administrator, the only evidence on record is the appellant’s written witness statement stating that the respondent’s Administrator, Victoria Orwa terminated the contract of service “without any reason notice or justification”
57. The written witness statement did not particularized the manner in which the alleged termination of services took place. For instance, was, it in the Administrator’s office or outside, what time of the day was it morning or afternoon, how was the termination effected. Was the appellant summoned? What



- happened after the termination of employment? Did the appellant appeal the decision or protest the termination of employment? Did the appellant return to the workplace for her dues, if any and when?
58. Such particulars would have reinforced the appellant's allegation that termination of employment was unfair or unlawful.
59. As currently framed, the appellant did not as a minimum indicate that she was on duty on that day or was summoned by the Administrator, or what she was told.
60. The appellant was obligated to prove a prima facie case of unfair termination of employment on the date it was alleged to have taken place consistent with the provisions of Section 47(5) of the *Employment Act*, which provide:
61. 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.
62. In *Nicholus Kipkemo Korir V Hatari Security Guards Ltd* [2016] eKLR, Abuodha J held:
- 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”.
63. These comments apply on all fours to the circumstances of the instant case.
64. The appellant adduced neither evidence to prove that his services were terminated on 13th February, 2025 nor evidence to show that the alleged termination of employment was unfair.
65. For the foregoing reasons, it is the finding of the court that the appellant failed to demonstrate that termination of her employment was unfair.
66. More significantly, having found and held that the appellant had failed to prove that she was an employee of the respondent 30th August, 2023, the issue of termination of a contract of service could not arise.

Reliefs

67. Having found as above, it follows that the claim for salary in lieu of notice and 12 months's compensation were not sustainable.
68. The claim for overtime lacked the requisite particulars to show that indeed it was earned and due to the appellant from 2010 – 2024 including why it was not claimed for more than 20 years.
69. As regards service pay, the provisional NSSF statement showed that the appellant was a registered member of the NSSF since January 2016 and was thus not eligible for service pay by dint of Section 35(6)(d) of the *Employment Act*.
70. The trial court gave directions on the KRA P9 Forms and Certificate of service which the court will not interfere with.
71. In conclusion, it is the finding of the court that, the appellant has failed to demonstrate the need for the court's interference with the judgment of the learned trial magistrate.
72. Consequently, the instant appeal is dismissed and the decision of the trial court is affirmed.



73. 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.

