Odera v Board of Management St Mary's Awasi Catholic Mission Hospital (Appeal E037 of 2025) [2025] KEELRC 2930 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2930 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E037 OF 2025

JK GAKERI, J

OCTOBER 29, 2025

BETWEEN

SELINE ATIENO ODERA .... 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 dated 28th May, 2025 in Seline Atieno Odera V Board of Management St. Mary's Awasi Catholic Mission Hospital Nyando MCELRC No. E005 of 2025.

2. The appellant's case before the trial court was that she was employed by the respondent on 10th June, 2022 as a nurse at Kshs.30,000.00 under a written contract of service which was renewed on 1st January, 2023, and served diligently until employment was terminated on 13th February, 2024 at which time her salary had risen to Kshs.31,000 and the respondent owed her salary for June, November and December 2023 and January and February 2024 and worked overtime, one (1) hour per day.

3. The appellant stated that termination of her employment by the respondent was unfair and prayed for: declaration that termination of employment was unfair, Kshs.1,061,653 as salary in lieu of notice, 12 months compensation, salary arrears, overtime, service pay, KRA P9 Form, Certificate of Service costs and interest.

4. The respondent neither entered appearance nor respond to the claim even after being granted leave by the court on 12th March, 2025. Formal proof proceedings took place on 16th April, 2025.

5. After careful consideration of the appellant's case and submissions by counsel, the learned trial magistrate found that the appellant's contract ended on 31st December, 2023 and she provided no

evidence of its renewal and was thus not an employee of the respondent after 31st December, 2023 and no unfair termination of employment could have taken place on 13th February, 2024.

6. The learned trial magistrate directed the respondent to issue the KRA P9 Form and Certificate of Service.

   This is the Judgment appealed against.

7. The appellant faults the trial court for having erred in law and fact by:

   1. Failing to consider the viva voce and documentary evidence tendered by the appellant showing that she was still in employment by the date of termination of employment.
   2. Misapplying the viva voce and documentary evidence tendered by the appellant.
   3. Failing to consider the appellant has written submissions.
   4. Failing to properly examine the evidence on record.
   5. Failing to apply itself judicially and/or adequately evaluate the evidence and submissions on record.

8. These grounds may be condensed into two namely: failure to consider, examine and misapplying of the appellant's evidence and failure to consider submissions.

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 up 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 Act, to urge the court to find that the appellant was the respondent's employee as at 13th February 2024.

11. Concerning unfair termination counsel contended that the trial did not make a finding so as to whether termination of employment was unfair or not.

12. 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.

13. 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.

14. Finally, on reliefs, counsel submitted that the appellant was entitled to all the relief played for at the trial court including over time and costs.

Respondent's submissions

15. Counsel submitted that appellate courts do not to lightly interfere with findings of fact by a trial court unless they were not based on evidence or the court misdirected itself in law as held in Selle & another Associated Motor Boat Co. Ltd [1968] EA 123.

16. According to counsel, the trial court considered the appointment letters on record and concluded that employment terminated on 31st December, 2023 and the alleged termination of employment on 13th February 2024 had no supportive evidence as the employment relationship had lapsed.

17. Reliance was place on United Millers Ltd John Mangoro [2016] eKLR.

18. On service pay, counsel cited the provisions of Section 35(6) of the *Employment Act* and the sentiments of the Court of Appeal in Rogoli Ole Manadiegi V General Cargo Services Ltd [2016] eKLR to urge that the appellant had not proved that she worked overtime.

19. On disregard for submissions, counsel submitted that the trial court indicated that it had considered the appellant's submissions.

Analysis

20. The role of the first appellate court in a matter is essentially a retrial of the case. The court is required to reconsider and evaluate the evidence presented in the trial court and make its own conclusions bearing in mind that it neither saw nor heard the witnesses to determine their demeanour and accordingly make an allowance in that regard.

21. See Selle and another V Associate Motor Boat Co. Ltd [1968] 123, Peters V Sunday Post [1958] EA 424, Mwana Sokoni V Kenya Bus Services Ltd [1985] KLR 93 and Kenya Ports Authority V Kutson [2016] eKLR.

22. This appeal turns on whether the learned trial magistrate appreciated and applied the oral and documentary evidence presented by the appellant.

23. In his written witness statement, the appellant stated that her employment effective 10th June, 2022 was by a written contract of service, which was subsequently renewed by the issuance of a another contract dated 1st January, 2024 which was also renewed and served diligently until 13th February, 2024 when her services were terminated by the respondent.

24. Other than the national identify card, the appellant availed a detailed contract of service dated 10th June, 2022 and a single letter dated 1st January, 2023 renewing the contract of employment from 1st January, 2023 to 31st December, 2023 at a consolidated salary of Kshs.30,000.00 with a 10% annual increment depending on satisfactory performance and 21 leave days.

25. No further written contract of service was provided save for unconfirmed Mpesa transactions between unidentified cell phone numbers showing receipt of Kshs.9,286.00 from Tabitha Wandolo 07XXXXXX6 and the sum of Kshs.500 sent to one Augustine Odhiambo 07XXXXX5.

26. The appellant's written witness statement made no reference to the Mpesa transactions in January, 2024 or identify the persons or purpose of the receipt and payments.

27. The provisional NSSF statement on record showed that the appellant's employer was the respondent and deductions had been remitted for 3 months in 2022 and 6 months in 2023 up to June.

28. The other document was the Advocates demand letter date 21st March, 2024 demanding Kshs.1,518,288.00

29. The totality of these documents is that the appellant was an employee of the respondent effective 10th June, 2022 under a one year fixed contract of service at Kshs.30,000.00 per month and she was a registered member of the National Social Security Fund (NSSF).

30. Significantly, the documents also reveal that the appellant's employment contract was renewed once and was due to lapse on 31st December, 2023.

31. Neither the Advocates demand letter nor has the appellant's written witness statement explain how and when the employment contract was extended after 31st December 2023.

32. The original contract dated 10th June, 2022 stated that salary would be paid through the bank.

33. Although the appellant faulted the learned trial magistrate for failing to find that she was in employment at the time of the alleged unfair termination of employment, and thus arrived at a wrong conclusion, the appellant did not demonstrate what piece or pieces of evidence the trial court failed to consider or why the conclusion of the trial court was wrong.

34. The trial court was unable to find evidence showing that the appellant's employment subsisted after 31st December, 2023 when it was scheduled to lapse simply because the appellant tendered evidence of the alleged renewal employment until the date of termination of employment.

35. Analogous to the trial court, the court is unable to discern that the appellant's employment contract was renewed by the respondent either before it lapsed or thereafter in 2024.

36. Thus, the appellant failed to prove that she was in the respondent's employment in January and part of February 2024 and can thus only recover the sum of Kshs.78,000.00 being the unpaid salary for June, November and December, 2023.

37. Concerning termination of employment, it is trite aw that for a termination to pass the fairness test, it must be proved that it was substantively justifiable and procedurally fair, as held in Naima Khamis V Lavington Security Guards ltd [2017] eKLR and Walter Ogol Anuro V Teachers Service Commission [2013] eKLR.

38. Put in the alternative, the provisions of the *Employment Act* are clear that the employer must have had a valid and fair reason to terminate the employee's employment and must have conducted the termination in accordance with a fair procedure.

39. When these requirements are fulfilled, the termination of employment passes muster.

40. In the instant case, the appellant testified and submitted that termination of her employment by the respondent on 13th February, 2024 was unfair for want of valid reason and attendant procedures as by law required.

41. Intriguingly, the appellant tendered no evidence to demonstrate whether on the material day she was at the workplace, where the alleged termination of employment took place and how Sister Victoria Orwa executed the event, including what the appellant did.

42. Equally, the appellant adduced no evidence to show whether she appealed the decision by word of mouth or in writing or notified any other person or subsequently returned to the place of work for her outstanding salary and other dues and what transpired.

43. Evidence of the event and other activities it may have precipitated would have given credence to the unsupported statement that Sister Victoria Orwa terminated the appellant's employment on 13th February, 2024 without reason, notice or justification.

44. Such particulars would have demonstrated that the alleged termination took place and was unfair, consistent with the provisions Section 47(5) of the *Employment Act*, which provides:

45. 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.

46. This provision requires the employee to evidentiary demonstrate a prima facie case of an unfair termination of employment or wrongful dismissal for the burden to shift to the employer.

    The employee must discharge the initial burden of proof.

47. The foregoing is fortified by the sentiments of Abuodha J in Nicholas Kipkemoi Korir V Hatari Security Guards Ltd [2016] eKLR as follows:

    > The 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 and in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour".
    >
    > These comments apply on all fours to the facts of the instant case.

48. As adverted to elsewhere in this judgment a part from indicating that she served diligently with dedication "until 13th February, 2024 when the respondent's Administrator Sister Victoria Orwa, without any reason notice or justification terminated my services" the appellant tendered no shred of evidence to prove that her services were indeed terminated on the material date and that the termination of services was unfair.

    The allegation of unfair termination of employment by the appellant lacked any supportive oral or documentary evidence.

49. It is trite that a statement perse that an unfair termination of employment has taken place on a particular date is not sufficient evidence of the termination of employments or that it was unfair for purposes of the provisions of the *Employment Act*.

50. Flowing from the foregoing, it is the finding of the court that the appellant failed to demonstrate that her employment was unfairly terminated on 13th February, 2024 and having earlier found that appellant had failed to show that her employment contract was renewed after its lapse on 31st December, 2023, it is unclear how termination could have occurred thereafter in the circumstances, as noted by the learned trial magistrate.

51. The upshot of the foregoing is that the appellant failed to evidentiary demonstrate that termination of her employment by the respondent took place and that it was unfair.

52. The trial court is also faulted for having failed to consider the appellant's submissions.

53. On paragraph 6 of the Judgment delivered on 28th May, 2025, the learned trial magistrate stated that she had carefully considered the submission in making the determination and did not have reproduce them in the Judgment. With such an explicit statement in the Judgment of the court the court is not persuaded that the trial court did not consider the submissions by counsel.

54. 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.

55. Be that as it may, submissions by counsel pray a significant role in litigation. They accord 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.

56. The totality of the foregoing is that the appellant has demonstrated a case for interference with the judgment of the trial court in the circumstances set out by Madan JA in United Insurance Co. Ltd & 2 others V East African Underwriters (Kenya) Ltd [1985] EA 898. See also Mbogo & another V Shah [1963] EA 93.

57. Concerning the alleged salary arrears, since June 2023, the court is persuaded that the same are recoverable for the simple reason that the appellant was in the respondent's employment at the time and the relevant particulars were availed, including the specific amounts.

58. However, as adverted to above, only the amounts owed prior to expiration of the 12 months contract of employment are recoverable, the sum of Kshs.78,000.00.

59. Having failed to prove that termination of her employment took place as alleged and that it was unfair, the claims for salary in lieu of notice and 12 month's compensation were unsustainable.

60. The claim for overtime lacked supportive evidence and thus unsustainable. A statement that the appellant used to work from 8:00am to 6:00pm and thus worked one (1) extra hour each day is not sufficient evidence that she did so. The claim is declined.

61. Being a registered member of the National Social Security Fund (NSSF), the appellant was disqualified from service pay by dint of the provisions of Section 35(6) of the *Employment Act*.

62. Consequently, the decision of the trial court is interfered with to the extent that the appellant is awarded the sum of Kshs.78.000 as unpaid salaries.

63. The directions of the trial court on the Certificate of service and KRA P9 Form is upheld.

64 Granted, that the appeal is partially successful, there shall be no Orders as to 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.