



**Odhiambo v Board of Management St Mary's Awasi Catholic Mission Hospital
(Appeal E036 of 2025) [2025] KEELRC 2937 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2937 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E036 OF 2025
JK GAKERI, J
OCTOBER 29, 2025**

BETWEEN

PHILLY ADHIAMBO ODHIAMBO APPELLANT

AND

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

*(Appeal against the Judgment of Hon. Edina Nyaboke Angima
dated 28th May, 2025 in Nyando MCELRC No. E006 of 202)*

JUDGMENT

1. This is an appeal from the Judgment of Hon. Edina Nyaboke Angima dated 28th May, 2025 in Nyando MCELRC No. E006 of 2024 in Philly Adhiambo Odhiambo V Board of Management St. Mary's Awasi Catholic Mission Hospital.
2. Briefly, the appellant's case was that she was employed by the respondent on 6th June, 2023 as a nurse at Kshs.25,000 per month, with three months probationary period, and served diligently until 13th February, 2023 when the Respondent's Administrator, one Sister Victoria Orwa terminated her employment without justification.
3. That the appellant used to work from 8:00am to 6:30pm and was entitled to overtime which was not paid.
4. The appellant prayed for a declaration that termination of employment was unfair, Kshs.887,115 as salary in lieu of notice, 12 month's compensation, salary arrears for June, November, December 2023 and January and February 2024, overtime, service pay, KRA P9 form, Certificate of service, costs, interest and any other relief the court deemed fit to grant.



5. The respondent neither entered appearance nor file a response to the claim, service notwithstanding. Formal proof proceedings took place on 16th April, 2024.
6. After considering the claim, evidence placed before the court, the learned trial magistrate and submissions by the appellant's counsel found that appellant had not demonstrated that she continued serving the respondent after confirmation, if it ever took place and had therefore not proved that she was in employment after 31st August, 2023 and the claim failed in its entirety with no Orders as to costs.
7. This is the Judgment appealed against.
8. The Appellant faulted the trial court on five (5) grounds; that the court erred in law and fact by:
 1. Failing to consider the viva voce and documentary evidence tendered by the appellant.
 2. Failing to consider the appellant's submissions written submissions.
 3. Failing to properly examine the evidence on record on the appellant's claim.
 4. Failing to apply herself judicially and or adequately evaluate the evidence and submissions on record.
 5. Crossly misapplying the oral and documentary evidence tendered by the appellant.
9. These grounds may be considered into two, namely; failure to consider, analyse, evaluate and apply the evidence on record and failure to consider the submissions.

Appellant's submissions

10. 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.
11. 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.
12. Concerning unfair termination, counsel contended that the trial did not make a finding as to whether termination of employment was unfair or not.
13. 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.
14. 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.
15. 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

16. In opposition to the appeal counsel for the respondent counsel cited the sentiments of the Court of Appeal in *Selle & another V Associated Motor Boat Co. Ltd* [1968] EA 123 to urge that the learned trial magistrate applied the law and facts correctly in dismissing the appellant's claim.
17. Reliance was also placed on the provisions of Section 47(5) of the *Employment Act* and 107 of the *Evidence Act* on the burden of proof of the appellant.
18. The decision in *Kenya Airways Ltd V Aviation & allied Workers Union Kenya & 3 Others* [2014] eKLR was also cited to reinforce the submission.
19. Also cited was the decision in *Rogoli Ole Manadegi V General Cargo Services Ltd* [2016] eKLR on the claimant's duty to prove having worked overtime.
20. Finally, counsel submitted that the learned trial magistrate correctly directed herself on the issue of burden of proof.
21. On employment of the appellant as at the date termination of employment, counsel urged that the appellant worked until 13th February 2024 when her employment was terminated.
23. Reliance was placed on the provisions of Section 9(2) and 10(7) of the *Employment Act* on the employer's duty to draft the written agreement and prove or disprove allegations in the absence of a written agreement.
24. The decision in *Edward Isedia Mukasia V Eldo Supermarket Ltd* [2015] Peter Ngunjiri Kariuki V Board of Management Magumano Secondary School [2022] eKLR were relied upon to submit that employment records were maintained by the employer and only the employer could prove or disprove the terms if the contract of employment was not available.
25. Concerning proof of unfair or unlawful termination of employment, reliance was placed on the Court of Appeal decision in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR to urge the elements of a fair termination of employment as well as the decisions in *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR, *Gilbert Mariera Makori V Equity Bank Ltd* [2016] eKLR and *James Ondima Kabesa V Trojan International Ltd* [2017] eKLR to urge that the provisions of Section 41 of the *Employment Act* must be complied for a termination to pass the test of procedural fairness.
26. On substantive justification for the termination of employment, reliance was placed on *Radar Ltd V Ali & another* [2023] KEELRC 1421 (KLR), *Joseph Kiprotich Bett V Kenya Commercial Bank Ltd* [2014] eKLR and *John Jaoko Othino V Intrahealth International* [2022] eKLR to urge that termination of the appellant's employment was not substantively justifiable.
27. On reliefs, counsel submitted that the appellant was entitled to all the reliefs as prayed for.
28. The respondent did not file submissions.

Analysis and determination

29. As adverted to elsewhere in this Judgment the appellant was principally contesting the manner in which the trial court appreciated and applied the evidence on record in arriving at its decision and non-consideration of submissions.
30. Before delving into the salient issues of the appeal, it is important to underscore the role of the first appellate court as this is a first appeal.



31. In *Selle & another V Associated Motor Co. Ltd* [1968] EA 123, the Court of Appeal stated:

... An appeal to this court from a trial court is by way of retrial and the principles upon which this court acts in such appeal are well settled. Briefly put they are that this 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 witnesses and should made due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of facts if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally *Abdul Hamead Saif V Ali Mohammed Sholan* [1955] 22 E.A.C.A 270).

See also *Jabane V Olenja* [1986] KLR 664.

32. On 16th April, 2025, the appellant adopted the written statement as his evidence in chief and produced the documents filed as exhibits.
33. The appellant's written witness statement dated 12th April, 2024 stated that she was employed on 6th December, 2022 as a nurse at Kshs.25,000 and the first 3 months would be probationary and would be confirmed thereafter based on satisfactory performance. The appellant stated that she was confirmed and served diligently until her employment was unfairly terminated on 13th February, 2024.
34. The appellant availed copies of 4 documents not the 5 mentioned by the List of Documents. She did not supply any bank statement. The copy of the national identity card identified the appellant as Philly Odhiambo.
35. The second document, a letter of appointment dated 6th June, 2023, which the respondent signed on 1st June, 2023 and the appellant on 23rd July, 2023. The letter stated that employment was effective 1st June, 2023 and confirmation was subject to satisfactory performance consolidated salary was Kshs.25,000 and 21 days annual leave.
36. The contract was terminable by 7 days, or notice of salary in lieu of notice.
37. The 3rd document was the provisional NSSF statement dated 25th February, 2024 showing that contributions were paid up in June, 2023. The document identified the respondent as the appellant's employer.
38. The last document was the counsel's demand letter.
39. Other than the appointment letter, the appellant tendered no iota of evidence of having been confirmed or continued rendering services to the respondent until the alleged termination and with no salary since November 2023. Indeed the appellant tendered no evidence to show she ever received any payment of salary from the respondent.
40. Evidence of a bank statement, employment card or duty rota for any of the months would have sufficed to show that services were rendered.
41. Puzzlingly, in her witness statement, the appellant stated that her confirmation letter was dated 1st June, 2023 but did not avail a copy or any other record or evidence of having remained an employee of the respondent after appointment.
42. Being an undefended suit, the principles enunciated in *Karugi & another V Kabiya & 3 others and Mbogo V Settlement Land Trustees* [2025] KECA 561 KLR and many other decisions apply thus:



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

43. It is the duty of the appellant to prove that she was an employee of the respondent as a preliminary issue.
44. As to whether the parties had an employment relationship, the letter of appointment is sufficient evidence of that fact. However, there was no scintilla of evidence on record to show that the appellant remained in the respondent’s employment until 13th February, 2024.
45. There is no indication that the appellant rendered any services to the respondent after appointment save for the NSSF contribution for June 2023.
46. In the absence of confirmation of employment after probation which was slated to end on 31st August, 2023, and alleged renewal of contract of employment, it is difficult for the court to find that the appellant had demonstrated that she was still in employment until 13th February, 2024 when the alleged termination of employment by Sister Victoria Orwa took place.
47. The trial court agonized on this issue and held that the appellant had not demonstrated that she was either appraised or confirmed and was thus not in the respondent’s employment beyond 31st August, 2023.
48. The learned trial magistrate, in the court’s view appreciated the viva voce evidence of the claimant but found the allegations of confirmation and renewal of employment unproven by verifiable evidence and this court is of a similar view.
49. As already underscored, he who alleges must prove. The appellant was by law required to show that the alleged confirmation of employment vide the letter dated 1st June, 2023 took place and additionally prove that she was still rendering services as at the date of the alleged unfair termination of employment.
50. The court is at a loss how a former employee claiming salary arrears and unfair termination of employment would have no documentary evidence of having written to the employer or any feedback by the employer after a follow up or anything verifiable to show that the non-payment of salary notwithstanding, the employment relationship remained until 13th February, 2023.
51. There is no evidence of follow up or demand of the arrears.
52. Analogous to the trial court, this court finds it difficult to find that the appellant was confirmed in employment and actually rendered services and was not paid a penny from November 2023 to 13th February, 2024.
53. It is the finding of the court that the claimant failed to prove that she was an employee of the respondent post 31st August, 2023 or that the employment contract was renewed by the respondent.
54. In the court’s view, the learned trial magistrate cannot be faulted on this issue.
55. Concerning termination of employment, the appellant alleged that it was unfair and unlawful. However, her written witness statement, the only evidence on the issue, only states that it was by Sister Victoria Orwa on 13th February, 2024.
56. The statement is conspicuously reticent on whether the appellant was on duty on that day, the venue of the termination, timing and the general circumstances, including how it was communicated and what the appellant did after the termination of employment.
57. The appellant adduced no evidence of the event having occurred on that day.



58. Termination of employment or wrongful dismissal is typically one of the lowest watermarks in the life of an employee, particularly where it was unforeseen or unanticipated.
59. This is because it is a life-changing occurrence and remains etched in the employee's mind throughout his or her life.
60. The absence of these facts or circumstances in the appellant's evidence hugely reduces the probative value of the unsupported statements made in the witness statement.
61. Relatedly, the statement was silent on whether the appellant appealed or returned to the workplace for her dues and what transpired. The law requires the employee to evidentiary prove that there was a termination on employment on the material date that it was unfair.
62. Under Section 47(5) of the *Employment Act*,

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.
63. In the course of discussing this provision in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* [2016] eKLR, Abuodha J stated:

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”.
64. These sentiments apply in equal force to the circumstances in the instant case.
65. The appellants alleged that her employment was terminated by one Sister Victoria Orwa on 13th February, 2024 but provided no evidence to show that a termination of employment had indeed took place on that day and that it was unfair. The allegations was unproven.
66. It is trite that a statement that a termination of employment occurred on a particular date is not sufficient evidence of the fact that a termination of employment took place or that it was not in accord with the law.
67. For the foregoing reasons, it is the finding of the court that the appellant failed to prove that termination of her employment by the respondent was unfair or unlawful.
68. In the circumstances, the appellant is only entitled to any accrued rights such as unpaid salary, leave days, overtime or rest days, if any.
69. The trial court is also faulted for having failed 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 submission in making the determination and did not have to reproduce them in the Judgment. With such an explicit statement in the Judgment of the trial court, the court is not persuaded that the trial court did not consider the submissions by counsel.



70. 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..."

71. The court is guided accordingly.

72. 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.

73. The court did not fall into error on this issue.

74. On the salary arrears prayed for, having failed to demonstrate that she was an employee of the respondent after probationary period, the court is satisfied that the claim for salary arrears was unproven and it is declined.

75. As regards overtime for December 2022 to February 2024, the appellant tendered no evidence in support of this claim, for instance was there any agreement that overtime was payable when and how including how and when it was being claimed from 2022 and had not been claimed.

76. Similarly, there was no evidence as to when the overtime was earned.

77. With no supportive evidence, the claim unsustainable.

78. For service pay, since the appellant was a registered member of the NSSF, she was disqualified from payment of service pay by dint of the provisions of Section 35(5)(d) of the Employment Act.

79. As regards avilment of the KRA P9 Forms to facilitate the filing of tax returns, matters germane to taxation are the exclusive domain of the Kenya Revenue Authority (KRA).

80. The appellant is entitled to a Certificate of service by dint of the provisions of Section 51 of the Employment Act.

81. The upshot of the foregoing is that the instant appeal is unsustainable and is for dismissal.

81. It is accordingly dismissed with 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.

DR. JACOB GAKERI

JUDGE

