



REPUBLIC OF KENYA



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**Mubisi v Tarmal Wire Products Limited (Employment and Labour Relations  
Appeal E005 of 2025) [2026] KEELRC 193 (KLR) (28 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 193 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2025**

**K OCHARO, J  
JANUARY 28, 2026**

**BETWEEN**

**LEONARD MUBISI ..... APPELLANT**

**AND**

**TARMAL WIRE PRODUCTS LIMITED ..... RESPONDENT**

*(Being an Appeal from the judgment of Hon. M. S. KIMANI, Senior Resident Magistrate in  
Mariakani CELRC Cause No. E 024 of 2021, dated and delivered on 28th February 2023)*

**JUDGMENT**

**Background**

1. Contending that he was at all material times an employee of the Respondent, who was constructively dismissed from his employment by the employer, the Appellant sued them, in the aforementioned court, seeking both declaratory and compensatory remedies. The Respondent resisted the Respondent's claim, denying his cause of action against it and entitlement to the reliefs sought.
2. After considering the parties' respective cases, the trial Court, in its judgment delivered on the above-mentioned date, substantially dismissed the Appellant's case, awarding him only one relief, namely a direction that he be issued with a certificate of service.
3. Aggrieved by the judgment, the Appellant assails the entire judgment, citing the grounds set out hereinafter. Pursuant to the directions of this Court, the appeal was canvassed by way of written submissions.



### **The Appellant's case before the trial court**

4. It was the Appellant's case that he first came into the employment of the Respondent in January 2021 as a General Labourer. At the time of his exit from the Respondent's employment, he was earning a monthly salary of KShs. 8,111.00 and a house allowance of KShs. 1,216.00.
5. On 27th September 2022, he was involved in a workplace accident, occasioning him bodily injuries. As a result, he was admitted to the hospital for two days. After he was discharged and advised to resume duty upon full recovery. He healed after 117 days.
6. On 4th February 2023, he returned to work with a doctor's instructions to perform only light work for six weeks. The Respondent's Human Resources Manager considered it necessary to allow him to be off duty for one more week on account of his health. He allowed him to report to work on 27th February 2023.
7. On February 25th, 2023, he was called back to the office by the secretary, who told him that his employment had been terminated. He inquired about the reasons for his termination, but no explanation was given. When he refused to sign the termination documents, they ordered him to leave the office.
8. Prior to the termination, he was not served with any notice in accordance with the terms of his contract of employment, nor given the reasons for the termination. As such, the termination was unlawful and unfair.
9. At termination, the Respondent refused to pay him his terminal dues, which included compensation for earned but untaken leave days, one month's salary in lieu of notice, service pay for the years worked, unpaid house allowance, and the cumulative salary underpayments for the period he worked for the Respondent.
10. He asserted that, as his employment was terminated unfairly, he was entitled to twelve months' gross salary as compensation thereof.

### **The Respondent's case before the trial court**

11. The Respondent, through its pleadings and the evidence of its witness, asserted that the Appellant was engaged by them under various fixed-term contracts, with the last being that of between 24th January 2023 and February 2023 in the capacity of a General Labourer.
12. The Appellant was paid a consolidated salary of KShs. 9, 357, which was well above the minimum wage set out in the General Wage Order gazetted on 8 January 2018.
13. The Appellant's fixed-term contract lapsed by effluxion of time. As such, his contract of employment was not terminated at the Respondent's initiative, as he alleged.
14. It was further asserted that where the Appellant proceeded for his leave, he executed leave forms, and whenever he did not utilise his leave days, he was compensated in lieu thereof.
15. The contract of employment being fixed term with an appointed date of lapse, issuance of a termination notice was not necessary.
16. The Appellant was a registered member of NSSF and NHIF at all material times. As such, he was not entitled to service pay.



## **The Judgment by the Lower Court**

17. After reviewing the parties' respective evidence and submissions by their counsel, the learned trial Magistrate entered judgment dismissing the Appellant's case with costs. He only awarded him a certificate of service as indicated hereinbefore

## **The Appeal**

18. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;
  1. The learned trial Magistrate erred in law and fact in finding that the Appellant was not unlawfully terminated.
  2. The learned Magistrate erred in law and fact when he found that the Appellant was not entitled to the reliefs sought.

## **Analysis and determination**

19. This Court functions as a first appellate court. Consequently, it is obliged to reevaluate the evidence, assess it independently, and form its own conclusions, bearing in mind that it neither observed nor heard the witnesses. Therefore, appropriate allowances should be made in this regard. See also *Selle & Another v. Associated Motor Boat Co Ltd & Others* [1968] EA 123.
20. I have thoroughly examined the three grounds of appeal, along with the parties' pleadings, the oral and documentary evidence presented before the trial court, and the written submissions by Counsel. In my view, this appeal hinges on two key issues: (a) Was the Respondent under a probationary contract at the time of separation? (b) How did the separation between the Appellant and Respondent in their employee-employer relationship occur? (c) whether the Respondent was entitled to the reliefs not granted by the learned Magistrate.
21. It is important to note from the outset that the parties took diametrically opposed positions regarding the nature of their employment relationship. The Appellant asserted in his pleadings and in his witness statement, which served as evidence in chief, that he had at all material times served under an indefinite employment contract, while the Respondent contended that the Appellant had at material times served under various fixed-term contracts, the last of which had a lifespan of one month.
22. In a dispute concerning the termination of an employee's employment, the employee cannot afford to deliberately or otherwise misrepresent the true form of the contract of employment under which they served at the material time, as the form is a material fact that must be unambiguously pleaded. The necessity is real, and it is heightened by the fact that the provisions of the *Employment Act* 2007 do not apply to all forms of termination in the same way. For example, the provisions of sections 41, 43, 45, and 47[5] do not apply to a fixed-term contract that has run its full course and is terminated by effluxion of time.
23. Despite maintaining a tone in his pleadings and witness statement [turned evidence in chief], that he served under a term contract, before the trial Court, he, in his evidence in chief, admitted that he worked on fixed term contract basis. He acknowledged that he executed that for the period 24<sup>th</sup> January 2023 to 24<sup>th</sup> February 2023.



24. Given the admission stated above, I am entirely unable to understand how the submissions made by the Appellant’s Counsel concerning the applicability of section 10[6] of the *Employment Act*, 2007, can be considered relevant or beneficial in this matter.
25. By reason of the foregoing premises, I am persuaded by the Respondent’s Counsel’s submissions that the Appellant’s contract of employment was, at all material times, fixed-term in nature. As such, the Learned trial Magistrate’s apt finding in his judgment that the Appellant’s employment was fixed-term in nature was correct.
26. The foregoing prompts me to answer the question: how did the separation occur? The Appellant consistently argued that the termination of his employment was initiated by the Respondent and was unfair and unlawful. Conversely, the Respondent maintained that the contract was terminated by effluxion of time and that the Appellant’s claim of unfair termination was therefore unfounded.
27. Having admitted in his evidence in chief that he last served under a contract of employment with a fixed term and an appointed lapse date, and that he had nothing to demonstrate that he worked beyond the appointed lapse date, I do not hesitate to make this finding that the Appellant’s employment came to termination by lapse of time.
28. Fixed-term contracts have an in-built termination notice, as they spell out the exact date when the contract will come to an end, making it superfluous for any requirement that a termination notice be issued to an employee before the termination date. As such, an employee cannot successfully allege unfair termination on the ground that a notice was not issued under section 35 of the *Employment Act*. There has been a line of authorities on this point from this Court and the Court of Appeal.
29. In *Margret A Ochieng v National Water Conservation and Pipeline Corporation* [2014] eKLR, the Court stated;

“The Court is persuaded the claim has no merit. The fixed -term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three-year contract in December 2008. She knew the termination would be upon the lapse of three years in 2011. The Respondent has no obligation to pay her notice pay as there was no premature termination of the fixed -term contract.”
30. In the upshot, I find that the Learned trial Magistrate correctly found that the Appellant did not prove his claim for unfair termination.
31. I now turn to consider whether the Appellant was entitled to the reliefs. This Court notes that the reliefs that the Appellant sought were in two categories: those that were dependent on the claim for unfair termination [compensation for unfair termination and notice pay], and those that weren’t-compensation for unutilized leave days, salary underpayments, unpaid house allowance, and service pay.
32. Having found as I have hereinabove that the termination of the Appellant’s employment was not at the initiative of the Respondent and that it was neither unfair nor unlawful, and that the learned trial Magistrate was correct in finding so, I hold that the Appellant was not entitled to compensation for unfair termination and notice pay.
33. A cause of action for salary underpayments can be based on the provisions of Section 48 of the *Labour Institutions Act*. The tone of the Act regarding salary payments to employees covered by Wage Orders and the minimum wages stated therein is that, at all relevant times, the salary should not fall below the prescribed minimum wage. Section 48 of the Act provides a mechanism for an employee who has been



underpaid to recover the difference between what they were actually paid during the material period and what they should have been paid if the employer had adhered to the prescribed minimum wages.

34. I observe that it isn't in dispute that the Regulation of Wages [General] [Amendment] Order 2018 was applicable at the material time to the Appellant. However, it is apparent that the Appellant missed the point that the Wage Order has not provided a uniform minimum wage for all workers, even where they fall under the same category, for example, General Labourers. The areas of their stations count a great deal. The Respondent pleaded that the Appellant was stationed at its premises at Mazeras. This was not disputed by Appellant. As such, the area of his station for the purposes of the Wage Orders would fall under the category "All other areas." The minimum wage for general workers at stations in this category was KShs. 7240.05, an amount which includes house allowance. This brings this Court to the conclusion that the claim for underpayment was not meritorious. It was correctly not allowed by the trial Magistrate.
35. As the Appellant's salary was inclusive of a house allowance, the same was rightly denied by the learned trial Magistrate.
36. The Appellant's Counsel has thoroughly argued the claim for compensation for earned but unused leave days, but I note that the Appellant did not provide any factual basis for this claim in his pleadings. He merely included the figures in paragraph 15 of the Statement of Claim. Similarly, in his witness statement [ turned evidence in chief], there was no supporting evidence for the claim. Extensive submissions are not a substitute for proof.
37. In the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR, the Court of Appeal stated;

"Submissions cannot take the place of evidence. The 1<sup>st</sup> Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and are unable to countenance it. Submissions, we reiterate, are generally parties' marketing tools, 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."

38. In the upshot, the Appellant's appeal fails. It is hereby dismissed with costs.

**READ SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JANUARY 2026.**

**OCHARO KEBIRA**

**JUDGE**

