Kenyanya v Nyangena Hospital Ltd (Appeal E034 of 2024) [2025] KEELRC 1278 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1278 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E034 OF 2024

JK GAKERI, J

MAY 5, 2025

BETWEEN

JOSEPHINE MOKOBI KENYANYA .... APPELLANT

AND

NYANGENA HOSPITAL LTD .... RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment of Hon. P. K. Mutai Principal Magistrate dated 4th December, 2023 in Kisii ELRC No. 009 of 2022 Josephine Mokobi Kenyanya v Nyangena Hospital Ltd.
2. The background of the appeal is that by a Statement of Claim dated 14th April, 2022, and filed on 21st April, 2022, the appellant sued the respondent alleging that she had been an employee of the respondent from 2015 and served diligently, but vide letter dated 1st October, 2021, the respondent intimated that her contract of employment would not be renewed.
3. The appellant prayed for a declaration that termination of employment was unfair, Kshs.727,131.23 as outstanding terminal dues comprising, salary in *lieu* of notice, unpaid leave days, 12 months compensation, public holidays, rest days and overtime. Costs of the claim and interest at court rates.
4. The respondent admitted that the appellant was its employee since 2015 but denied terminating her employment unlawfully. It averred that the appellant was employed under a fixed term contract effective 1st November, 2020 to 31st October, 2021 which lapsed by effluxion of time and had been consulted before she signed the contract and had been notified of the non-renewal of the contract and was paid her final dues.
5. It was the respondent's case that the appellant was a member of the NSSF, took her annual leave, rest days and public holidays and any overtime was compensated. The respondent prayed for dismissal of the suit with costs.

6. Both parties filed submissions dated 18th and 14th September, 2023 respectively.

7. After consideration of the evidence on record and submissions by parties, the learned trial magistrate found that the appellant had not been unlawfully terminated from employment awarded Certificate of Service and costs of the claim.

8. The court further found that the appellant and the respondent had a fixed term contract which lapsed.

This is the judgment appealed against.

9. The appellant faults the learned trial magistrate on the grounds that, he erred in law and fact by:

    1. Disregarding evidence on record and failing to appreciate that there were two concurrent contracts [oral and written] and left out the oral one thus falling into error.

    2. Not holding that the respondent forced the appellant to sign the fixed term contract which amounted to an unfair termination of the oral contract.

    3. Not holding that the forced signing of the fixed term contract enabled the respondent avoid its obligations under the oral contract and amounted to an unfair labour practice.

    4. Not finding and holding that the alteration of the terms of employment from permanent to fixed term amounted to an unfair labour practice.

    5. Failing to appreciate that the appellant had served for 19 years.

    6. Failing to appreciate the evidence on record that the respondent admitted that the appellant was employed in 2008 [not 2002 as counsel states].

    7. Disregarding the appellant's written submissions.

10. The appellant prays for Orders that:

    a. The appeal be allowed.

    b. The Judgement of the trial court be set aside and varied in terms and for Orders that:

        i. The respondent terminated the appellant's employment unfairly in 2021.

        ii. Award of Kshs.727,131.23 in compensation for unfair termination.

        iii. Issuance of two [2] Certificates of Service for the oral and written contracts.

        iv. Costs of the suit.

11. While the first 6 grounds of appeal implicate the manner in which the learned trial magistrate appreciated and applied the evidence before the court, the 7th is specific to the disregard of the appellant's submissions.

Appellant's submissions

12. On failure to appreciate the appellant's length of service under Section 50 of the *Employment Act*, Counsel placed reliance on the provisions of the *Employment Act* to urge that severance pay was due and cited the decision in Thomas & Piron Grand Loc's Ltd v Momanyi]2024] 2186 [KLR].

13. As regards the two contracts, counsel urged that the appellant served under an oral contract from 2009 till 2020 and the respondent unilaterally coerced the appellant to sign a one [1] year fixed term contract.

14. Reliance was placed on the decision in Symon Wairobi Gatuma v Kenya breweries Ltd & 3 Others [2024] KESC 52 [KLR] on unliteral variation of terms of employment by an employer to submit that the appellant was coerced by threats of non-payment of salary and argue that the appellant was serving under the oral and written contracts of service, a fact the trial court failed to appreciate.

15. According to the counsel the appellant's right to fair labour practice was violated.

16. Reliance was placed on the decision in Milton M. Isanu v Agakhan Hospital Kisumu [2017] eKLR to urge that the trial court failed to address itself to the oral contract of service.

18. On the alleged compulsion or duress, counsel submitted that the appellant signed the contract without free will and accumulated salary arrears were not paid.

19. Reliance was placed on the decision in Kabue v Co-operative Bank of Kenya [2021] KEELRC 2271 [KLR] on the appellants right to a fair termination of employment to submit that court ought to find that the unlawful termination of the oral contract was an unfair labour practice.

20. Reliance was also made on the decisions in Elizabeth Washeke & 62 Others v Airtel Networks [K] Ltd & another [2013] eKLR and Ruth Gathoni Ngotho Kariuki v PCEA & another [2012] eKLR on exploitation of employees by employers, to submit that alteration of the appellant's contract by the respondent amounted to unfair labour practice.

Respondent's submissions

21. On the extent to which the court may interfere with the finding of fact by a trial court, reliance was placed on the sentiments of the court in Nkube v Nyamiro [1983] KLR 403.

22. Concerning the two concurrent contracts and coercion, counsel for the respondent submitted that the issue was never pleaded but was raised on appeal and parties are bound by their pleadings.

23. Reliance was made on Section 2 of the *Employment Act* to urge that a contract service is either oral or written as was the decision in Kenya Plantation and Agricultural Workers Union v Kenya Cuttings Ltd [2012] eKLR.

24. On construction of written contracts, counsel urged that the respondent consulted the appellant as she was sensitized on the new contract and signed the contract on 1st November 2020 thereby terminating the oral contract.

25. Reliance was also made placed on the sentiments of the court in Aristide Marege Nyangau v Lavington Security Ltd [2021] KEELRC 959 [KLR] to urge that the appellant signed the contract voluntarily and freely and had not pleaded coercion.

26. Similarly, sentiments of the court in Wachanga v Revere Technologies Ltd [2024] KEELRC 21B5 [KLR] and Bunyi v Saab Kenya Ltd [2023] KEELRC 3238 [KLR] on proof of duress and its impact on a contract, to urge that duress was unsubstantiated.

27. As to whether termination of the appellant's employment was unlawful, counsel submitted that the contract signed by the appellant was clear on its duration and expiry and cited the decisions in S. S. Menta & Sons Ltd v Saidi Abedi Mwanyenga [2021] eKLR Margaret A. Ochieng v National Water Conservation and Pipeline Corporation [2014] eKLR and Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho [2017] eKLR on the jurisprudence on fixed term contracts, to submit that the appellant's contract ended by effluxion of time and cannot claim unfair or unlawful termination of employment.

28. As regards the reliefs sought, counsel submitted that none was available to the appellant in that the claim for overtime was exaggerated, had no specific period and was based on a 7 days' workweek yet the appellant did not work for 7 days in a week.

29. Sentiments of the court in Ragoli Ole Manaideigi v General Cargo Services Ltd [2016] eKLR were cited to urge that the claim was not based on any evidence, as were those in James Orwaru Nyaundi v Kilgoris Klassic Sacco Ltd [2022] eKLR, Apex Stallin v Dominic Mutua Muendo [2020] eKLR and Monica Wanza Mbaru v Rootspec Allied Works Co. Ltd [2021] eKLR, on claims for overtime, holiday pay and proof.

30. On rest days, counsel urged that since the appellant worked for 6 days, the prayer for rest days was unavailable.

31. On service pay counsel submitted that the same was irrecoverable by dint of section 35 [5] [d] of the *Employment Act*, as the appellant was a member of the NSSF as held in Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Ltd. [2014] eKLR, and Ndungu Kiarie v Waithaga Farm Extension Ltd [2022] eKLR and Lillian Mwende Nzabu v Trustees and office Bearers of Diocese of Anglican Church of Kenya [2018] eKLR.

32. Counsel further submitted that the claim for annual leave was unsustainable because the appellant proceeded on annual leave in 2020 and 2021 and any continuing injury or damage ended in 2019 since the claim was filed in 2022 and any claim would have been statute barred as held in Kengo Bakari Mwandogo v Kaluworks Ltd [2020] eKLR and G4S Security Services [K] Ltd v Joseph Kamau & 468 Others [2018] eKLR.

33. Finally, counsel submitted that the prayer for salary in lieu of notice was unavailable since the contract required no termination notice. Reliance was placed on the decision in Anytime Ltd v Fredrick Mutobera Omuraya [2020] eKLR.

Analysis and determination

34. I have considered the appeal, submissions by parties and the authorities cited.

35. This being a first appeal, the court is enjoined to reconsider and re-evaluate the evidence afresh and make a determination on the issues that arise.

36. Put in the alternative, the first appellate court conducts a retrial.

37. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal stated:

> " An Appeal to this court from a trial…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"

38. See also Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931, Selle & another v Associated Motor Boat Co. Ltd [1968] EAA 123 and Abok James t/a A. J. Odera & Association v John Patrick Macline t/a Machira and Co. Advocates [2013] eKLR.

39. As adverted to elsewhere in this judgment, the memorandum of appeal largely faults the trial court on matters of the evidence on record and it behoves the court to re-evaluate that evidence afresh.

40. Although the appellant confirmed on cross-examination, that she started working on 1st March, 2015, the statement of claim cites the year 2015 only and the witness statement dated 14th April, 2022 had no date of employment.

41. However, the respondent admits that the appellant was employed in 2015 and her salary had risen to Kshs.13,000.00 by 2021.

42. Relatedly, other than stating that the dismissal from employment was unfair, had worked for 7 years, was not accorded sufficient notice and her benefits were withheld, the written witness statement and the statement of claim are loudly silent on the one [1] year fixed term contract of employment, alleged duress, coercion or threats, two concurrent contracts of employment and claims for leave, overtime, rest days, workweek and public holidays.

43. In this particular case, the issue of signing the contract hurriedly and with threats" only came up on re-examination. It did not arise during cross-examination.

44. During cross-examination, the appellant confirmed that she was given the one year fixed term contract on 1st September, 2020 and admitted having received the notice of non-renewal of the contract of employment.

45. The witness admitted that she worked for six days weekly did not pray for rest days, and had not indicated that she worked overtime and was not paid.

46. She admitted having signed the contract without looking at the details and thus did not know what was in it.

47. Records filed by the respondent show that the appellant completed the contract on 1st November, 2020 by inserting her details including the duration of the contract and signed on the same day as admitted during the hearing. However, the appellant did not attach the last page of the employment contract which had her signature, name, identity card number and date of appointment.

48. The issue of coercion or duress is rather interesting. In her written witness statement dated 14th April, 2022, about 6 months after the alleged termination of employment, the appellant did not indicate that she signed the contract of employment "hurriedly and with threats" indeed, neither the statement of claim nor the witness statement makes reference to any coercion, duress or threats.

49. The issue only came up during re-examination by the appellant's counsel, a tactical way of ensuring that the appellant mentioned it in court.

50. Regrettably, the appellant did not explain who issued the threats and the form they took.

51. The court finds it not credible that the appellant could not recall the alleged threat, duress or coercion when she recorded her witness statement in 2022, 1 1/2 years after it happened and had to be prompted by his advocate to remember it in 2022 almost 3 years later.

52. At any rate the Dr. Stephen Matoke denied having coerced the appellant.

53. Finally, the appellant did not testify as to when the coercion was exerted, by whom and where it took place bearing in mind that the appellant attended the sensitization meeting on 13th October, 2020 and signed the attendance sheet as serial No. 14.

54. Although the respondent did not avail minutes of the sensitization or report, the appellant did not deny that it took place or that the subject matter was different or something else transpired.

55. Evidence on record reveals that the appellant signed the contract on 1st November 2020 accepting the terms and conditions therein effective 2008 when she was employed.

56. In the courts view, based on the evidence adduced by the appellant and the respondent there is no indication that the contract of employment dated and signed by the appellant on even date was vitiated by duress.

57. At common law signature prima facie denotes acceptance and the document signed binds the signatory unless it is proved that the signature was procured by misrepresentation, mistake, duress or undue influence. [see L'Estrange v. Graucob [1934] 2KB 394

58. In Parker v South Eastern Railway Co. 2CPD 421 Mellish L J. stated:

> " In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature and in the absence of fraud it is wholly immaterial that he has not read the agreement and does not know its contents."

59. In the instance case, the appellant did not deny having signed the contract of employment but alleges duress after serving the term of the contract and forgot to plead it or insert it in her witness statement.

60. In simple legal parlance duress means actual or threats of violence or imprisonment of the party affected or a member of his or her household. See Gandhis Another v Ruda [1956] KLR 556.

61. The threat must relate to bodily harm and person threatening must be capable of carrying it out and illegal as it must relate to the commission of a crime or a tort.

62. In a contractual setting, the violence or threat must have been exerted by the other party to the contract not a 3rd party.

63. Analogous to misrepresentation and undue inference, duress renders a contract voidable at the option of the affected party.

64. It is incumbent upon the party alleging to have been coerced to take steps to avoid the contract by or complaining about it or filing a suit.

65. In this case, the appellant did not complain about the alleged duress or write about it or sue the respondent during the currency of the employment contract, which in the court's view constituted acquiescence, if there was any duress.

66. The appellant cannot purport to rely on the alleged duress after serving the term of the contract. The doctrine of estoppel by conduct estops her from doing so as it would be unfair to the respondent. Having accepted the new terms and served contract term, the appellant is estopped from raising the issue of duress.

67. See D & C Builders v Sidney Bees [1966] 24B 617 cited in John Mburu v Consolidated Bank of Kenya [2018] eKLR.

68. In sum, duress cannot be relied upon expost facto as the contract it allegedly vitiated does not exist.

69. Although the appellant's counsel faulted the trial magistrate for not holding that the appellant was coerced to sign the fixed term contract by the respondent and submitted vociferously on the issue, counsel regrettably, had no evidence to rely on in arguing that appellant was coerced as neither the statement of claim dated 14th April 2022 nor the appellant's witness statement of even date or any other verifiable evidence was adduced in support of the alleged duress.

70. It is trite law that he who alleges is obligated to adduce evidence in support of the allegation as ordained by the provisions of Section 107, 108 and 109 of the *Evidence Act*.

71. Section 107 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.

72. Section 108 of the *Evidence Act* provides:

    The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

73. See Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh [2021] eKLR, Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR, Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others [2014] eKLR and SUT vTA [2019] eKLR among others.

74. In the instant case, the appellant bore the burden of establishing that she was indeed coerced or threatened to sign the contract of employment but failed to lay before the court any material from which the courts could find or infer duress.

75. I conclude this part with the sentiments of the Court of Appeal in Pius Kimaiyo Langat v Cooperative Bank of Kenya [2017] eKLR that:

    > " Alike to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, fraud or undue inference are pleaded and proved."

76. The appellant neither pleaded nor proved coercion or any other vitiating element of the contract of employment and the threat to withhold an employee's salary does not amount to duress in law.

77. See Pao & others v Lau Yiu & another [1979] 3ALLER. 65, and Kenya Commercial Bank Ltd & another v Samuel Kamau Macharia & 2 others [2008] eKLR.

78. The foregoing disposes of grounds 2 and 3 of the memorandum of appeal.

79. Concerning the oral and written contracts in force simultaneously or concurrently, the court is in agreement with the submission of the respondent's counsel that the issue was neither pleaded nor raised in the trial court and parties are bound by their pleadings.

80. Issues for determination in cases emanate from the pleadings and a court can only pronounce itself on such issues. See Galaxy Paints Co. Ltd v Falcon Guards Ltd, Court of Appeal Case No. 219 of 1998, Adetoun Oladeji [NIG] Ltd v Nigeria Breweries P.L.C. SC91/2002 [sentiments of Pius Aderemi J. S C] cited in Joseph Mbuta Nziu Kenya Orient Insurance Co. Ltd [20150 eKLR, Daniel Otieno Mogire v. South Nyanza Sugar Co. Ltd [2018] eKLR and Raila Amolo Odinga & another v IEBC & 2 others [2017] eKLR.

81. In the latter case the Supreme Court stated: -

    > " ...It is a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them pleadings ensure that each sides is fully alive to the questions that are likely

to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues only arise when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."

82. Following the appellant's argument on this unpleaded issue, perhaps the only issue for consideration is what happened to the oral contract the appellant had entered into with the respondent?

83. Simply stated, the oral contract merged with the written contract and it was thus discharged by the appellant's action of signing the new contract.

84. A merger is one of the legitimate bilateral approaches of terminating a contract by agreement where the rights and obligations of the parties are subsumed in the new agreement and thus enforceable.

85. In the court's view, there was only one contract of employment between the appellant and the respondent dated 1st November 2021, effective 2008.

86. Having voluntarily signed and served the one-year fixed term contract without avoiding or faulting it in anyway, the appellant cannot be heard to say that there was an oral contract of employment between her and the respondent and whose terms and conditions were not tabulated for the respondent's rebuttal.

87. The trial court cannot be faulted for failing to discern and make a finding on an unpleaded issue, and which the appellant adduced no evidence in support of.

88. The foregoing disposes of ground number one of the memorandum of appeal.

89. On the alleged unilateral alteration of the contract of employment, it is trite law that a unilateral variation of a contract of employment by either party amounts to a breach of the contract or repudiation as held by the Supreme Court in Symon Wairobi Gatuma v Kenya Breweries Ltd & 3 Others [Supra].

90. See also Ibrahim Kamasi Amoni v Kenital Solar Ltd [2018] eKLR, Rigby v Ferodo Ltd [1987], Kenya County Governments Workers Union v Wajir County Government & Another [2020] eKLR, Ronald Kamps Lugaba v Kenol Kobil Ltd [2016] eKLR, Jackline Wakesho v Aroma Case [2014] eKLR and Maxwell Miyawa v Judicial Service Commission [2017] eKLR.

91. Although the appellant had not pleaded or testified that her contract of employment was unilaterally varied by the respondent, the respondent availed evidence to show that it sensitized the appellant with others on the new contract and signing of the contract took place after the sensitization.

92. The appellant attended the sensitization scheduled for 13th October, 2020.

93. Section 10[5] of the *Employment Act* provides that

    [5] Where any matter stipulated in subsection [1] changes, the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing.

94. Although the respondent is faulted for having unilaterally varied the terms of the employment contract from permanent to fixed term, the appellant did not deny that he was invited for a sensitization meeting, attended, signed the attendance sheet and subsequently signed the contract of employment.

95. It is trite law that a fixed term contract is a legitimate approach to employment where the parties agree on the commencement and end date of the contract of employment.

96. Needless to gainsay, the respondent would have had serious challenges if its employees, including the appellant, had refused to sign the contract, which was within their right to do, but did not.

97. The appellant could, if he had any concerns about the contract or was forced sign do so under protest or write a letter or email to express his displeasure the respondent's conduct.

98. The verbal allegation made in court during the hearing lacked supportive evidence and was of no probative value.

99. It is trite law that an employee's consent to the variation of terms of a contract of employment need not be express. It can be implied and inferred from the conduct of the employee including, remaining in employment after the revised terms of employment are operationalized or signing the agreement containing the altered terms and conditions.

100. See James Angama v Judicial Service Commission [2017] eKLR cited in Joseph Ngungu Wairiuko v Tassia Coffee Estates Ltd [2022] eKLR.

101. Based on the evidence on record, it is the finding of the court that the respondent consulted the appellant and her colleagues before the new contract of employment was operationalized on 1st November, 2020 and the appellant signed, it in addition to remaining in employment, which constituted an express and implied acceptance of the new terms of employment.

102. The court is unable to discern any unilateral change of the terms of employment and is consequently not persuaded that the learned trial magistrate fell into error.

103. The other issue addressed by the parties is whether termination of the appellant's employment was unfair or unlawful.

104. While the appellant submitted that signing of the new contract of employment amounted to an unfair termination of the oral contract, the respondent submitted that the appellant was serving under a fixed term contract and it lapsed by effluxion of time.

105. In the statement of claim, the appellant was challenging the termination of her employment at the end of October 2021 as opposed to the oral contract submitted on by counsel.

106. In her written witness statement, the appellant stated that her employment was unlawfully terminated on or about 1st October, 2021, and thus could not have been referring to the oral contract counsel submitted on.

107. Having found that there was only one contract of employment between the appellant and respondent on account of a merger on 1st November, 2020, and having further found that the appellant failed to prove that his signature on the contract of employment was procured by duress, misrepresentation, fraud or undue influence, the appellant was bound by the terms of the contract and had no other option but abide by its terms.

108. The principles that govern fixed term contracts are well settled.

109. In Anne Theuri v Kandet Ltd [2013] eKLR Rika J stated inter alia:

> " ...Once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period..."

110. Similarly, in Margaret A. Ochieng v National Water Conservation & Pipeline Corporation [2014] eKLR Rika J stated:

> "Automatic renewal would undermine the very purpose of the fixed term contract, and revert to indeterminate contracts of employment… courts have upheld the principle that fixed term contracts carry no expectancy of renewal, in a catena of judicial authorities…"

111. The foregoing sentiments of Rika J. were cited with approval by the Court of Appeal in Transparency International-Kenya v Teresa Carlo Omondi [2023] KECA 174 [KLR].

112. In Registered Trustees of Presbyterian Church of East Africa and Another v Ruth Gathoni Ngotho [supra] the Court of Appeal stated:

> "Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations or expectations beyond the date of expiry. Accordingly, any claim based after expiry of the respondent's contract ought not to have been maintained…
>
> Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained".

113. The issue was also addressed in Francis Chire Chachi v Amatsi Water Services Co. Ltd [2012] eKLR, Registered Trustees De La Salle Christian Brothers T/A St. Mary's Boys Secondary School v Julius D. M. Baini [2017] eKLR and Transparency International – Kenya v Teresa Carlo Omondi [Supra].

114. In the latter case, the Court of Appeal held:

> "The court is in agreement with these sentiments. We dare say that an automatically renewable fixed-term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under a fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived. Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation"

115. The jurisprudence emerging from these decisions is that a fixed term contract is one of the recognized forms or species of contracts of employment with a fixed date of commencement and termination and there is no obligation on the part of the employer to give a notice of termination as the termination is self-executing by effluxion of time unless the contract itself creates the obligation.

116. Since the contract of employment comes to an end when its defined duration lapses the employer is not required to give reasons for the separation.

117. In the instant case, uncontroverted evidence shows that the appellant voluntarily and willingly entered into a fixed term contract for a period of one [1] year effective 1st November, 2020 and the contract lapsed on 31st October, 2021, thereby terminating the employment relationship between the parties.

118. As to whether termination of the appellant's employment was unfair or unlawful, the court returns that the employment relationship between the appellant and the respondent ended on account of effluxion of time.

119. Finally, the learned trial magistrate was faulted for failing to consider the appellant's submissions.

120. The appellant's submissions dated 18th September, 2023 addressed three issues namely; whether the appellant was unlawfully, unprocedurally and unfairly summarily dismissed from employment, entitlement to compensation for the unfair termination, leave days and all statutory deductions.

121. The trial court addressed two issue namely; whether the appellant was unfairly dismissed and entitlement to the reliefs prayed for.

122. Before analysing the issues, the learned trial magistrate stated: "I have considered the pleadings and written submissions filed".

123. Relatedly, the issues isolated by the trial court for determination are similar to those identified by the appellant in her submissions.

124. The trial court expressed itself as follows:

> " The contract was fixed term contact. It was for one year. It is cardinal rule of proof that whoever alleges bears the burden of discharging it. I find no evidence to suggest that the claimant was coerced to sign the said contract. Before the contract expired the respondent issued one-month notice of non-renewal. The claimant contends that this was not sufficient notice and amount to unfair dismissal. This cannot be true…
>
> I therefore find that this being fixed term contract, the claimant was lawfully terminated".

125. These sentiments envince that the learned trial magistrate addressed the question whether termination of the appellant's employment was unlawful or unfair.

126. In the court's view, it would be vexatious to find that the trial magistrate fell into error on the issue of submissions.

127. In Daniel Toroitich Arap Moi v Stephen Mureithi & Another [2014] eKLR, the court re-stated the role of submissions in a case as follows:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What happened in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. 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 the evidence presented".

128. See also Raila Amolo Odinga v I.E.B.C & 2 Others [2013] eKLR, Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, Eratus Wande Opande v Kenya Revenue Authority & Another HCC No. 46 of 2007 and Nancy Wambui Gatheru v Peter W. Wanjere Ngugi HCCC No. 36 of 1993 among others.

129. Concerning the reliefs prayed for, the trial court held that the appellant had not presented evidence to demonstrate entitlement to any of them.

130. The court however, directed the respondent to issue a Certificate of Service.

131. As regards service pay, the appellant tendered no evidence to show that he was not a member of the NSSF or that deductions were not being made and remitted to the NSSF.

132. Under Section 35[6][d] of the *Employment Act* service pay is not payable to an employee who was a member of the NSSF, which is a compulsory pension scheme for all employees in Kenya.

133. The claim was unsustainable and unmerited.

134. On salary in lieu of notice, having found that the appellant's employment contract terminated by effluxion of time and no notice was necessary, although one was issued, the claim was unmerited.

135. As regards unremitted NSSF deductions, the appellant's written witness statement dated 14th April, 2022 makes no reference to any deducted but unremitted NSSF dues, the period and how much.

136. The claim lacked supportive evidence and was unmerited.

137. As to whether the appellant is entitled to payment for rest days, the simple answer is in the negative on account that the appellant adduced no evidence as to his work week and the number of days in question.

138. More importantly, the appellant confirmed on cross-examination that she worked for 6 days in a week in accordance with Section 27 of the *Employment Act* which provides:

    1. ...

    2. Notwithstanding subsection [1], an employee shall be entitled to at least one rest day in every period of seven days.

139. The claim lacked supportive evidence and was unmerited.

140. Concerning public holidays, the appellant led no evidence as to the public holidays on which he was on duty and when.

141. The court cannot assume that the appellant was at work on every public holiday for 7 years.

142. The decisions in Ragoli Ole Manaidelgi v General Cargo Services Ltd [Supra], James Orwaru Nyaundi v Kilgoris Klassic Sacco Ltd [Supra] and Apex Steel Ltd v Dominic Mutua Muendo [Supra] cited by the respondent's counsel on public holidays or rest days are spot on.

143. Simply stated, the appellant threw figures and numbers to the court without supportive evidence in anticipation of an award.

144. The claim was unmerited.

145. Similarly, the claim for overtime is based on the assumption that the appellant worked from 6:00 am to 6:00 am daily for months for 7 years.

146. If the claim is to be believed, the appellant spent all her time at the workplace and everything remained equal for the entire duration of employment which is not the case owing to vicissitudes of life which dictate otherwise.

147. The meticulously computed figure lacked supportive evidence as neither the statement of claim or written witness statement nor the oral testimony adduced in court attested to the fact that the appellant worked overtime.

148. The claim lacked supportive evidence and was unmerited.

149. As regards leave, the claim is grounded on the assumption that the appellant did not proceed on leave even for a single day for 7 years, which ought to be supported by evidence that she was not allowed to proceed on leave or exigencies of duty prevented her from doing so.

150. The appellant's Leave Application Forms on record reveal that in 2021 the respondent approved compensation for the untaken leave days on 2nd October, 2021 and leave application for 2020 was confirmed on 2nd March 2020 by one Dr. Orwenyo.

151. The respondent tendered no evidence to prove that leave for previous years was taken or the appellant was compensated and awarded pay for untaken leave for 2017, 2018, and 2019 Kshs. 27,300.00.

152. The claim lacked supportive evidence and was unmerited.

153. As regards compensation for unfair termination, having found that the appellant served under a fixed term contract as held by the trial court and as affirmed herein, the claim for compensation was neither sustainable nor merited.

154. Finally, the appellant is entitled to a Certificate of Service for the duration served by dint of Section 51 of the *Employment Act*.

155. The trial court's finding on leave is upheld save for the amount awarded, the court awards Kshs. 27,300.

156. The upshot of the foregoing is that the appellant's appeal lacks merit and it is accordingly dismissed.

157. Parties shall bear own costs of this appeal.

Orders accordingly.

DATED, SIGNED AND DELIvERED vIRTUALLY AT KISUMU ON THIS 5TH DAY OF MAY, 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

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