Moraa v Nyangena Hospital Ltd (Appeal E031 of 2024)
[2025] KEELRC 1281 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1281 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E031 OF 2024

JK GAKERI, J

MAY 5, 2025

BETWEEN

IMMACULATE MORAA ..... APPELLANT

AND

NYANGENA HOSPITAL LTD ..... RESPONDENT

(This is an appeal against the Judgment of P. K. Mutai, Principal Magistrate in Kisii MCELRC No. E014 of 2022, Immaculate Moraa V Nyangena Hospital Ltd.)

JUDGMENT

1. The brief facts of the case are that the appellant instituted a suit against the respondent alleging that her employment had been terminated without notice after serving diligently since 2006 and was not paid terminal dues. The appellant prayed for; declaration that termination of employment by the respondent was unfair, Kshs.1,475,678.00 as terminal dues for the duration served, costs and interest. The claimant's written statement states that her salary was Kshs.11,140 as at the date of dismissal.

2. The respondent admitted that it employed the appellant in 2008 as a receptionist, not a mortician as alleged by the appellant and her contract of employment dated 1st November, 2020 was for a fixed term and lapsed. The respondent prayed for dismissal of the suit with costs.

3. After consideration of the evidence and submissions by the parties, the learned trial Magistrate found and held that the appellant was serving under a fixed term contract of one (1) year which lapsed and no unfair termination of employment had taken place and the appellant was not entitled to the reliefs sought. The court, however, directed the respondent to issue the appellant with a certificate of service and parties were to bear own costs.

4. This is the Judgment appealed against.

5. The learned trial Magistrate is faulted on various grounds; that the court erred in law and fact by:

1. Disregarding apparent evidence on record and failing to appreciate that there were two separate and current contracts between the parties (oral and written) and fell into error.

2. Not holding that the respondent's act of forcing the appellant to sign the fixed term contract amounted to an unfair termination of the oral contract.

3. Not holding that the respondent's act of forcing the appellant to sign the fixed term contract amounted to an unfair labour practice as it enabled the respondent avoid its obligations under the oral contract.

4. Not finding and holding that the respondent's act of altering the appellant's terms of contract from permanent to fixed term amounted to unfair labour practice.

5. Failing to appreciate the purport of Section 50 of the *Employment Act* in determining the appellant's case by failing to appreciate the length of the appellant's service.

6. Failing to appreciate the evidence on record and the submissions especially the respondent's admissinton that the appellant had been an employee since 2006.

7. Disregarding the appellant's submissions on record.

6. The appellant prays for Orders that:

   a. The appeal be allowed.

   b. The Judgment and decree of the trial court be set aside and varied in terms that termination of the appellant's employment by the respondent was unfair award of Kshs.606,437.00 as compensation, tow certificates of service and costs of the appeal.

7. While six (6) grounds of appeal fault the trial court's appreciation and application of the evidence on record, the last ground faults the trial Magistrate for disregarding submissions.

Appellant's Submissions.

8. On failure to appreciate the appellant's length of service under Section 50 of the *Employment Act*, Counsel placed reliance on the provision 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).

9. As regards to 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.

10. Reliance was placed on the decision in Symon Wairobi Gatuma V. Kenya breweries Ltd & 3 Others (2024) KESC 52 (KLR) on unilateral variation of terms of employment by an employer.

11. Counsel submitted that the appellant was coerced by threat of non-payment of salary to contend that the appellant was serving under the oral and written contract of service, a fact the trial court failed to appreciate.

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

13. The decision in Milton M. Isanu V Agakhan Hospital Kisumu (2017) eKLR was also relied upon to urge that the trial court failed to address itself to the coral contract.

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

15. Reliance was placed on the decision in Kabue V Co-operative Bank of Kenya (2021) KEELRC 2271 (KLR) to submit that the court ought to find that the unlawful termination of the oral contract was an unfair labour practice.

16. Reliance was also made on the decision in Elizabeth Washeke & 62 Others V Airtel Networks (K) Ltd & another (20130 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 and fixed term contracts respectively.

Respondent's Submissions.

17. 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.

18. 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.

19. Reliance was placed 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.

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

21. Reliance was also placed on the sentiments of the court in Aristide Marege Nyangau V Lavington Security Ltd (2021) KEELRC 959 (KLR) on coercion, to urge that the appellant signed the contract voluntarily and freely and had not pleaded coercion.

22. 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 were cited to urge that duress was unsubstantiated.

23. 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 could not allege unfair or unlawful termination of employment.

24. As regards the reliefs sought, counsel submitted that none was available to the appellant as the claim for overtime was exaggerated, had no specific period and was based on a 7 days workweek yet the appellant worked for a lesser number of days per week.

25. 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. On service pay counsel submitted that it was irrecoverable by dint of section 35 (5) (d)

of the *Employment Act*, as she was a member of the NSSF as held in Elijah Kipkoros Tonui V Ngara Opticians ta Bright Eyes Ltd. (2014) eKLR, and Ndungu Kiarie V Weithaga Farm Extension Ltd (2022) eKLR and Lillian Mwende Nzabu V Trustees and office Bearers of Diocese of Anglican Church of Kenya (2018) eKLR.

31. Counsel further submitted that the claim for leave was not sustainable as no specific period was pleaded and the respondent availed leave forms which were not controverted. Counsel submitted that leave claims before 2014 were statute barred. It amounted to a continuing injury or damage.

32. Counsel urged that the appellant took annual leave or was compensated from 2014 to 2021.

33. Finally, counsel submitted that the prayer for salary in lieu of notice was unavailable since the contract required no termination notice.

34. Reliance was placed on the decision in Anytime Ltd V Fredrick Mutobera Omanya (2020) eKLR.

Analysis and determination.

35. I have considered the appeal, submissions by the parties and the authorities relied upon.

36. This being a first appeal, the role of the court is as articulated by the Court of Appeal in Selle and Another V Associated Motor Boat Co. & Others [1968] E.A. 123 thus:

> This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled.

37. 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 witness and should make due allowance in this respect..."

38. See also Peters V Sunday Post Ltd [1958] EA 424, Mursal & Another (Suing as the Legal Administrator of Dalphine Kanini Manesa) Civil Appeal E20 of 2021 [2022] KEHC 282 (KLR) Mativo J. (as he then was) Gitobu Imnayara & 2 Others V Attorney General [2016] eKLR and Abok James Odera ta A. J. Odera & Associates V John Patrick Machira ta Machira and Co. Advocates [2013] eKLR among others.

39. As adverted to elsewhere in this judgment, the learned trial magistrate is largely faulted on the evidence placed before the court during the trial and it behoves this court to reconsider and re-evaluate the evidence and draw its own conclusions.

40. Puzzlingly, although the appellant's statement of claim stated that she was employed in 2006, her written witness statement is silent and copies of the NSSF provisional member statement of account for the appellant dated 5th October, 2021 shows that NSSF deductions commenced in January 2004 and the date of employment is indicated as 5th January, 2004.

41. The respondent stated that it employed the appellant as a receptionist in 2008.

42. Finally, the Contract of Employment dated 1st November, 2020 stated that the date of employment was 1st of January, 2006.

43. Notably, the appellant's written statement dated 14th April, 2022 recorded 1½ years after the one (1) year fixed term contract commenced, make no reference to the alleged duress, coercion or threats.

44. Equally, the witness statement is loudly silent on an unpaid salary over the duration of employment, membership of the NSSF, working on public holidays or rest days, overtime or unutilized leave days.

45. The trial court found that there was no evidence of duress, coercion or threats.

46. Notably, the issue only came up during cross-examination when the appellant retorted that "I was coerced to sign it". It was her testimony that she was told that if she did not sign the contract her salary would not be paid. It is unclear to the court the alleged salary was for which month bearing in mind that the appellant signed the contract on 26th November, 2020.

47. It is intriguing that the issue of duress or threats in the signing of the one (1) year fixed term contract was not captured by the statement of claim or the written witness statement both dated 4th April, 2022 about 1[1]2 years after the alleged coercive conduct by the respondent.

48. The brief allegation in court that the appellant was threatened with non-payment of salary without a context as to where, when, how and by whom the coercion was exerted or any particulars diminishes the probative value of the evidence.

49. The appellant's desire is to convince the court that some unnamed person coerced her to sign the contract dated 1st November, 2020 by threatening not to pay her salary for an unknown month in an unidentified place and the appellant neither resisted or sign the contract under protest and could not remember the fact of being forced when she instructed her advocate or signed the witness statement or at any other time thereafter during and after separation, but remembered that she was threatened on 19th July, 2023, during cross-examination sounds implausible and far-fetched.

50. It is not in dispute that the appellant attended the sensitization meeting scheduled for 13th October, 2020 and signed the attendance sheet as serial number 11. On cross-examination, the appellant denied having seen the invitation notice but admitted that the contract was explained to her at the Human Resource Office.

51. Even though the respondent did not produce minutes of the meeting or other report of the proceedings, the appellant did not deny that the meeting took place or that the agenda was different.

52. The appellant signed the one (1) year fixed term contract on 26th November, 2020 and confirmed the date of her appointment as 1st January, 2006.

53. In his written submissions dated 4th September, 2023, the appellants' counsel submitted that she was coerced into signing the Contract of Employment by the respondent on terms that if she did not sign the notice her salary for October 2020 would not be paid.

54. In her evidence before the court, the appellant confirmed on cross-examination that she was coerced to sign the contract yet earlier on in her testimony she stated that the Human Resource Office told her about the contract and explained it to her.

55. It is unclear to the court what notice the appellant's counsel was referring to since she did not sign the contract until 26th November, 2020 and the appellant adduced no testimony on signing of a notice. Her testimony in court related to the contract of employment.

56. In the court's view, based on the evidence adduced by the parties before the trial court, there is nothing on which an allegation of duress or coercion could stand on.

57. There is no shred of plausible evidence to suggest or demonstrate that the contract of employment executed by the appellant on 26th November, 2020 was vitiated by duress.

58. At common law signature prima facie means acceptance. It denotes acceptance or agreement and binds the signatories unless it is proved that the signature was procured by misrepresentation of the contents of the document, mistake, duress or undue influence (See L'Estrange V Grancob [1934] 2 KB 394).

59. In the word of Mellish LJ in Parker V South Eastern Railway Co. 2 C. P. D. 416

> In an ordinary case, when 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".

60. In L'Estrange V Grancob (Supra) Scrutton L J. stated:

> ... where a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound and it is wholly immaterial that he has read the document or not".

61. In the instant case, the appellant did not deny having signed the contract of employment but alleges that she was forced to do so and the allegation was made over 6 months after serving under the terms of the contract and neither pleaded nor mentioned it in her witness statement or in any other verifiable document.

62. In the court's view, the appellant's contention that she was force to sign the contract of employment was an afterthought, something analogous to the sagacious aphorism that 'a drowning man will clutch at a straw'.

63. It need not be belaboured that the appellant was bound by the terms of the contract she signed on 26th November, 2020.

64. In simple legal parlance duress means actual or threats of violence or imprisonment of the affected party or a member of his or her household.(See Gandhis & Another V Ruda [1986] KLR 536.

65. Typically, duress comprises threats to cause bodily harm to the person and the person threatening must be capable of actualizing the threat, which at common law must be illegal as it must relate to the commission of a tort or crime.

66. For duress to be sustained, it must be proved that it was exerted by the other party to the contract as opposed to a 3rd party and it renders a contract voidable at the option of the party alleged to have been subjected to duress.

67. It behooves the person alleging to have been coerced to take steps to avoid the contract by opting out of it or complain to the other party or file a suit to challenge the alleged agreement.

68. In this case, the appellant did nothing about the duress she alleged in court as she neither declined to sign the contract, sign the contract under protest nor raise the issue after signing the contract during the subsistence of the employment relationship or anytime, thereafter, which in the court's view, signifies acquiescence, assuming that indeed she was forced to sign the contract.

69. The doctrine of estoppel by conduct estops the appellant from raising the issue as it would be inequitable to the respondent who relied on the appellant's signature and paid her a salary for the entire duration of the contract.

70. Having signed the agreement, and thus accepted its terms and served for the entire duration of the contract, the appellant is estopped from alleging that the contract was vitiated by duress.

71. See D and C Builders V Sidney Rees [1966] 2 Q. B. 617 cited by the Court of Appeal in John Mburu V Consolidated Bank of Kenya [2018] eKLR.

72. Arguably, duress cannot be relied upon ex post facto as the contract it allegedly vitiated does not exist.

73. Although the appellant's counsel faulted the trial magistrate for not holding that the appellant was coerced to sign the fixed term contract and submitted vociferously on the issue before this court, counsel regrettably had no material before the court to rely on as neither the statement of claim or the witness statement nor the oral evidence adduced in court provided the requisite particulars or other verifiable evidence to suggest that the appellant did not exercise free will when she signed the contract of employment on 26th November, 2020.

74. It is trite law that he who alleges is bound to prove the allegations as ordained by the provisions of Section 107, 108 and 109 of the *Evidence Act*.

75. 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.

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

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

78. 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."

79. The appellant neither pleaded nor proved coercion or any other vitiating element of the contract of employment.

80. Similarly, the threat to withhold the employee's salary does not amount to duress in law.

81. See Pao & others V Lau Yiu & another (1979) 3ALLER. 65, and Kenya Commercial Bank Ltd & another V Samuel Kamau Macharia & 2 others (2008) eKLR.

82. The foregoing disposes of grounds 2 and 3 of the memorandum of Appeal.

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

84. 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. SC912002 (sentiments of Pius Aderemi J. S C) cited in Joseph Mbuta Nziu V Kenya Orient Insurance Co. Ltd [2015] eKLR, Daniel Otieno Mogire V. South Nyanza Sugar Co. Ltd (2018) eKLR and Raila Amolo Odinga & another v IEBC & 2 others (2017) eKLR.

85. 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 their 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."

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

87. 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. 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.

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

89. 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 whose terms and conditions were not tabulated for the respondent's rebuttal.

90. In the courts view, 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.

91. The foregoing disposes of ground number one of the Memorandum of Appeal.

92. On the alleged unilateral alteration of the contract, 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).

93. (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.

94. Although the appellant had neither pleaded nor testified that his 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 the signing of the contracts came must later after the sensitization.

95. 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.

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

97. 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.

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

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

100. The verbal allegation made in court during the hearing lacked supportive evidence lacked probative value.

101. It is trite law, that an employee's consent to the variation of terms of a contract 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.

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

103. Based on the evidence on record, it is the finding of the court that the respondent consulted the appellant and his colleagues before the new contracts of employment was operationalized on 1st November, 2020 and the appellant signed it and remained in employment, which amounted to express and implied acceptance of the new terms of employment.

104. 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.

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

106. While the appellant submitted that signing of the new contract 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.

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

108. In his written witness statement, the appellant stated that her employment was unlawfully terminated on or about 1st October, 2021. Clearly, this could not have been the oral contract counsel was alluding to.

109. I will now proceed to determine whether the appellant's contract terminated on account of effluxion of time or was unlawfully terminated.

110. Having found that there was only one contract of employment between the appellant and respondent on account of the merger on 1st November, 2020, and having further found that the appellant failed to prove that her 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 option than abide by its terms.

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

112. 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..."

113. 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..."

114. 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].

115. Similarly, in Registered Trustees of Presbyterian Church of East Africa and Another V Ruth Gathoni Ngotho (Supra) the court held:

> 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...

116. Similarly, since the respondent's contract came to an end by effluxion of time any claim for wrongful termination could not be maintained".

117. The issue was also considered in Francis Chire Chachi V Amatsi Water Services Co. Ltd [2012] eKLR, Registered Trustees De La Salle Christian Brothers TA St. Mary's Boys Secondary School V Julius D. M. Baini [2017] eKLR and Transparency International – Kenya V Teresa Carlo Omondi (Supra).

118. In the latter case, the Court of Appeal expressed itself as follows:

> 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"

119. The jurisprudence emerging from these decision 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 termination is self-executing by effluxion of time, unless the contract itself creates the obligation.

120. However, the employer is not bound to give a reason or reasons for the termination other than effluxion of time since the contract of employment comes to an end when its defined duration lapses.

121. 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.

122. On the issue whether termination of the appellant's employment was unfair and unlawful, the court returns that the employment relationship between the appellant and the respondent came to an end on account of effluxion of time.

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

124. 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.

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

126. Before delving into the issues, the trial court stated as follows: "I have considered the pleadings and written submissions filed".

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

128. 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...

129. I therefore find that this being fixed term contract, the claimant was lawfully terminated".

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

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

132. 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".

133. 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.

134. Concerning the reliefs sought, the trial court found that the appellant was not entitled to any as none had been proved to be merited.

135. As regards salary for a fixed term of 14 years at Kshs.11,140 per month, the appellant adduced no evidence on any unpaid salary for the entire duration of her employment.

136. This prayer may have been grounded on the signature page of the contract of employment which required the appellant to indicate the date of appointment where she inserted the date of 1st January, 2006.

137. The claim, in the court's view, is grounded on a misconception that the contract of employment was backdated to the initial date of appointment yet paragraph 3 of the contract provided for the duration of the contract.

138. Being a species of special damages, the unpaid salary, if any, ought to have been pleaded and proved as held in Hahn V Singh [1985] eKLR 716, Richard Oloo V South Nyanza Sugar Co. Ltd [2013] eKLR, Nizar Virani TA Kisumu Beach Resort V Phoenix East Africa Assurance Co. Ltd [2004] eKLR, Gulhamid Mohamedaji Jiwaji V Sanya Electrical Co. Ltd [2003] eKLR and Coast Bus Services Ltd V Sisco E. Murunga Ndanyi and 2 Others Civil Appeal No. 192 of 1992.

139. The claim was unsubstantiated and unmerited.

140. As regards service pay, the respondent submitted that the sum of Kshs.77,980.00 prayed for was not payable because the appellant was a registered member of the National Social Security Fund (NSSF) and was ineligible for service pay by dint of the provisions of Section 35(6)(d) of the *Employment Act* as held in Elijah Kipkoros Tonui V Ngara Opticians ta Bright Eyes Ltd (supra).

141. The appellant did not submit on the issue directly.

142. Evidence on record shows that the appellant was NSSF member number 675746817 from 2004 and the respondent was deducting and remitting deductions, albeit intermittently before May 2014.

143. The claim was unmerited.

144. On pay in lieu of notice, Kshs.11,140.00, having found that the appellant was serving under a fixed one (1) year contract of employment, which lapsed on 31st October, 2021 as contemplated by the parties thereto, the prayer for pay in lieu of notice was unsustainable as there was neither unlawful nor unfair dismissal or termination of employment.

145. The prayer was unmerited.

146. The foregoing findings of the court apply on all fours to the prayer for compensation, Kshs.133,680.00 for unfair termination.

147. The prayer was unmerited.

148. As regards public holidays, Kshs.51,986, (minimum 10 days per year), the prayer lacked requisite particulars as to the specific public holidays on which the appellant was at work.

149. The amount claimed lacked supportive evidence.

150. It behooved the appellant to prove when he worked on public holidays as held in Ragoli Ole Munaidelgi V General Cargo Services Ltd (Supra). See also James Orwaru Nyaundi v Kilgoris Classic Sacco Ltd (Supra).

151. The claim was unproven and unmerited.

152. The foregoing applies on all fours to the claim for rest days, Kshs.623,840, which was a blanket claim based on the assumption that the appellant worked 4 extra days per month for 8 years without fail yet on cross-examination before the trial magistrate, the appellant confirmed that she worked for six (6) days per week and thus had one (1) rest day as by law required and led no evidence of having worked on any of the rest day for the entire duration of her employment.

153. The claim lacked particulars and was unmerited.

154. As regards overtime, the appellant's witness statement is loudly silent on her having worked any extra hour and admitted on cross-examination that she did not specify when she worked overtime.

155. The appellant's prayer was based on the assumption that she worked 4 extra hours daily for 30 days in a month for a period of 8 years and was not paid and had no evidence of having claimed during the currency of her employment by the respondent.

156. The claim for Kshs.623,840.00 was unsubstantiated and unmerited.

157. On leave, the appellant prayed for 21 days salary for 14 years Kshs.109,172.00.

158. This prayer was based on the assumption that the appellant did not proceed on leave for a single day during the 14 years, or paid for untaken leave days and did not raise the issue with the employer.

159. The appellant's Leave Application Forms on record reveal that in 2016, the appellant was paid Kshs.6,490 for untaken leave days for 2015, Kshs.9,700 for untaken leave in 2016, Kshs.12,000 for untaken for 2017, and Kshs.9,780 for untaken leave for 2018.

160. In 2020, the appellant's annual and maternity leave were approved on 28th April, 2020, a total of 90 days in lieu of 111 days as by law required since maternity leave is 3 months.

161. Finally, the appellants leave for 2021 was approved on 5th March, 2021. The appellant adduced no evidence to prove that she did not proceed on leave in 2021.

162. Based on the evidence on record, the appellant was paid for untaken leave or proceeded on leave save for 2019 and less number of maternity leave days in 2020 as she was accorded 60 days in lieu of 90 days.

163. The court is satisfied that the appellant is owed one (1) month's salary as maternity leave in 2020 and leave pay for 2019.

164. Had the trial court considered the documentary evidence on record, it would have realized that the appellant did not proceed on leave in 2019 nor paid and was accorded 60 days maternity leave in lieu of 3 months as ordained by Section 29 of the *Employment Act*.

165. Finally, the circumstances in which an appeal court may interfere with the exercise of judicial discretion were outlined in Price and Another V Hilder [1996] KLR 95 and more emphatically by Madan JA (as he then was) in United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fire and General Insurance Co. Ltd V East African Underwriters (Kenya) Ltd [1985] eKLR.

166. In view of the foregoing, the court is satisfied that a case for interference with the findings of the learned trail magistrate has been made.

167. Consequently, the trial court's finding that the appellant was not entitled to leave pay is set aside and in its place an award of Kshs.22,100.00 for untaken leave days.

168. Accordingly, the appeal is partially successful to the extent that:

    a. The appellant is awarded Kshs.22,100.00 for untaken leave days.

b. For the avoidance of doubt, other findings and holding by the trial court are upheld.

c. Parties shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 5TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE