Ondieki v Nyangena Hospital Ltd (Appeal 032 of 2024)
[2025] KEELRC 1280 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1280 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL 032 OF 2024

JK GAKERI, J

MAY 5, 2025

BETWEEN

SAMUEL MIRAMBO ONDIEKI .... CLAIMANT

AND

NYANGENA HOSPITAL LTD .... RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. P. K. Mutai delivered on 6th November, 2023 in Kisii MCELRC case Number E005 of 2022)

JUDGMENT

1. The brief facts of the case are that the appellant was employed by the Respondent as a mortician from 2002 and his salary rose from Kshs. 8000 to Kshs. 12500.
2. The Appellant alleged that he was unlawful dismissed from employment in 1st October 2023 without notice or compliance with attendant procedures.
3. The Appellant prayed for a total of Kshs. 2,699,684.35 comprising service pay, salary in lieu of notice, 12 months compensation, NSSF deductions not remitted, public holidays, rest days, overtime and leave.
4. The Respondent's case was that it employed the appellant in 2008. That the appellant's last fixed term contract ended on 31st October 2021 and was not renewed.
5. That the contract was signed after consultations with the appellant and vide letter dated 2nd October 2021 was notified of the non-renewal of the contract.
6. The respondent denied having terminated the appellant's employment unlawfully.

7. When cross-examined, the appellant confirmed that he started working in 2008 not 2002. He testified that he was forced to sign contract by threat of non-payment of salary but did not state so in the witness statement. That the coercion was verbal.

8. Both parties filed submissions addressing the issues of whether termination of employment was lawful and entitlement to the reliefs prayed for.

9. After considering the evidence before the court and submissions by counsel, the learned trial Magistrate found and held that the non-renewal of the one (1) year fixed term contract of employment did not amount to unfair termination of employment.

10. The court found that the appellant was not entitled to any of the reliefs sought but directed the respondent to issue a certificate of service and each party was to bear own costs.

11. This is the Judgment appealed against.

    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.

       The Appellant prayed that:

       1. The appeal be allowed.

       2. The Judgment of the trial court be set aside and varied and orders that:

          i. Respondent unfairly terminated the appellant from employment.

          ii. Award of Kshs. 2,699,684.34.

          iii. Issuance of two certificates of service.

          iv. Costs

12. In the court's view, the grounds of appeal implicates the trial court's failure to appreciate and apply the evidence adduced before the court case and number 7 is specific to submissions.

Appellant's Submissions

13. On failure to appreciate the appellant's length of service under the provisions of the *Employment Act*, Counsel placed reliance on an incorrect provision of the *Employment Act* to urge that severance pay

was due. The decision in Thomas & Piron Grand Loc's Ltd V Momanyi (2024) 2186 (KLR) was relied upon on severance pay.

14. 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.

15. 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 contend that the appellant was serving under the oral and written contract of service, a fact the trial court failed to appreciate.

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

17. Equally 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 oral contract.

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 claimant's 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. Further reliance was 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.

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 of 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 he was sensitized on the new contract and signed the contract on 1st November 2020 thereby terminating the oral contract.

25. Reliance was 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 were 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.

Mehta & 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.

29. Sentiments of the court in Rogoli 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 Nyaudi 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 burden of 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 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 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. That leave claims before 2014 were statute barred it was 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 Omuraya (2022) 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 court is enjoined to reconsider and re-evaluate the evidence afresh and make a determination on the issues that arise.

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

38. In Gitobu Imanyara & 2 others v Attorney General (2016) eKLR the Court of Appeal stated:

> "An Appeal to this court from a … 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"
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> (See also MwanaSokoni V Kenya Bus Services Ltd (1985) KLR 931 Selle & another V Associated Motor Boat Co. Ltd (1968) EA 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 evidence on record and it behooves the court to re-evaluate that evidence afresh.

40. Although the appellant alleged that he was employed as a mortician in 2002, his witness statement is palpably silent on the date or year of employment but admitted on cross-examination that he was employed in 2008 not 2002.

41. Similarly, his written statement signed on 14th April 2022, about 6 months after the alleged dismissal from employment is silent on the alleged coercion or threats or duress or the two concurrent contracts, leave, overtime or workweek, rest days and public holidays.

42. The trial court held that there was no evidence to suggested that the appellant was coerced to sign the employment contract.

43. The issue of being forced to sign the employment contract in November 2021 only came up during cross-examination by counsel for the respondent. Indeed, the appellant testified that he was forced to sign both contracts under threats of no-payment of salary. He however, admitted that he did not mention the alleged threat in his witness statement written about 15 months earlier.

44. To surmise that the appellant could not remember a threat that took place in October 2020 in 2022, but could recall it almost three (3) years later and did not raise it during the subsistence of the contract of employment is in the court's view to overstretch imagination. Dr. Stephen Matoke denied having coerced anyone into signing the contract of employment.

45. Puzzlingly, the appellant did not testify as to when the coercion was exerted, by whom and where it took place bearing in mind that he attended the sensitisation meeting on 13th October 2020 and signed the attendance sheet as serial number 17.

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

47. Documentary record reveals that the appellant signed the contract on 1st November 2020 accepting the terms and conditions therein effective 2008 when he was employed.

48. In the courts view, based on the evidence adduced by the appellant and the respondent, there was no indication that the contract of employment dated and signed by the appellant on 1st November, 2020 was vitiated by duress.

49. At common law signature prima facie denotes acceptance and the document signed binds the signatory unless it is proven by evidence that the signature was procured by misrepresentation, mistake duress or undue influence. (see L Estrange V Graucob (1934) 2KB 394

50. 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."

51. 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 his witness statement.

52. 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.

53. The threat must relate to bodily harm and person threatening must be capable of carrying it out.

54. The threat must be illegal as it must relate to the commission of a crime or a tort.

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

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

57. It is incumbent upon the coerced party to take steps to avoid the contract by opting out of the it or complaining about it or filing a suit.

58. 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 is evidence of acquiescence, if there was any duress.

59. The appellant cannot purport to rely on the alleged duress after serving the term of the contract. The doctrine of estoppel by conduct estoppes him from doing so as, it would be unfair to the respondent. Having accepted the terms and served for the entire duration the appellant is estopped from raising the issue.

    See D & C Builders V Sidney Bees (1966) 24B 617 cited by the Court of Appeal in John Mburu V Consolidated Bank of Kenya (2018) eKLR.

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

61. 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 the case of coercion 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 provided in support of the alleged duress.

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

    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.

63. 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.

64. 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 SYTVTA (2019) eKLR among others.

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

66. 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.”

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

68. Similarly, the threat to withhold an employee’s salary does not amount to duress in law.

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

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

71. Concerning the oral and written contracts allegedly 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.

72. It is trite law that 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.

73. 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 side 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.”

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

75. Simply stated, in the court’s view, the oral contract merged with the written contract and it was thus discharged by the appellant’s action of signing the new contract.

76. 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.

77. Significantly, there was only one contract of employment between the appellant and the respondent dated 1st November, 2021, effective 2008.

78. 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, and whose terms and conditions had not been tabulated for the respondent's rebuttal.

79. Clearly, 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 to establish.

80. The foregoing disposes of ground number 1 of the memorandum of appeal.

81. On the alleged unilateral alteration of the contract of employment 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).

82. 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.

83. Although the appellant had not pleaded or testified that his contract of employment was unilaterally changed 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 contract came much later after the sensitization.

84. The appellant attended the sensitization on 13th October, 2020.

    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.

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

86. 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.

87. Needless to gainsay, the respondent would have faced a huge challenge if the employees, including the appellant had refused to sign the contract, which was within their right to do, but they did not.

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

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

90. 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 employee's conduct, including remaining in employment after the revised terms of employment are operationalized or signing the agreement containing the altered terms and conditions.

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

92. 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 contract of employment was operationalized on 1st November, 2020 and the appellant signed it in addition to remaining at work, which amounts to express and implied acceptance of the new terms of employment.

93. 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 on this issue.

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

95. While the appellant submitted that the 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.

96. 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.

97. In his written witness statement, the appellant states that his employment was unlawfully terminated on or about 1st October, 2021 and thus could not have been referring to the oral contract counsel was alluding to.

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

99. 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 than abide by its terms.

100. The principles that govern fixed term contracts are well settled 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..."

101. 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..."

102. 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].

103. Similarly, the Court of Appeal addressed the issue of fixed term contracts in Registered Trustees of Presbyterian Church of East Africa and Another V Ruth Gathoni Ngotho and held that:

> " 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".

104. The issue was also considered 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).

105. 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"

106. 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 the termination is self-executing by effluxion of time, unless the contract itself creates the obligation.

107. 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.

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

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

110. 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.

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

112. Before delving into the issues, the trial court stated "I have considered the pleadings and written submissions filed".

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

114. 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".

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

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

116. In Daniel Toroitich Arap Moi V Stephen Mureithi & Another [2014] eKLR, the court re-stated the role of submissions 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".

117. The court is in agreement with these sentiments.

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.

118. Concerning the reliefs prayed for, the trial court held that the appellant had not availed evidence to prove that he was entitled to any of them.

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

120. 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.

121. It requires no belabouring that 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.

The claim was unsustainable.

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

123. Concerning unremitted NSSF deductions, the appellant's written witness statement dated 14th April, 2022 made no reference to any deducted but unremitted NSSF dues, for which period and how much.

124. The claim lacked supportive evidence and was unmerited.

125. 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 in support of the claim.

126. More importantly, the appellant confirmed on cross-examination that he 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.

127. The claim lacked merit and was unmerited.

128. Concerning public holidays, the appellant adduced no evidence as to the public holidays on which he was on duty and was not paid.

129. The court cannot assume that the appellant was at work on every public holiday for 13 years.

130. 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.

131. Simply stated, the appellant threw figures and numbers to the court without supporting evidence but in anticipation of an award.

132. The claim for overtime was based on the assumptions that the appellant worked from 6am to 6am at 16 hours of overtime daily every day, months for 13 years.

133. If the claim is to be believed, the appellant spent all his time at the workplace and everything remained equal for 13 years which is not credible as vicissitudes of life dictate otherwise.

134. The meticulously computed figure lacks supportive evidence as neither the statement of claim, written witness or oral testimony adduced in court attested to the fact of the appellant having worked overtime.

135. The claim lacked merit.

136. As regards leave, the claim was grounded on the assumption that the appellant did not proceed on leave for a single day for 13 years, which ought to have been supported by credible evidence that he was not allowed to proceed on leave or exigencies of duty prevented him from doing so.

137. The trial court found that the appellant was on annual leave from 7th March, 2021 to 30th March, 2021.

138. From the record, the appellant's Leave Application Forms on record reveal that in 2014 he applied for 21 days leave for 2013 but requested his leave to be paid and was paid Kshs.6420 for untaken leave for 2013. His leave for 2017 was paid for in February 2018 and was also paid for annual leave for 2012.

139. Similarly, in October 2021 the appellant's application for annual leave was approved by the respondents Human Resource Manager and the Hospital Manager and on 29th May, 2021 his application to proceed on annual leave for 24 days was approved as was the application dated 4th December, 2020.

140. Finally, the appellant's annual leave for 2018 was compensated for at Kshs.10,101.00 on 4th January, 2019.

141. These documents, which the claimant did not controvert show that the appellant's claim for leave pay was not grounded on facts.

142. A claim for the untaken leave days would have been more persuasive.

143. The claim lacked supportive evidence and was unmerited.

144. As regards compensation for unfair termination, having found that the appellant served under a fixed term contract as held by the trial court, the claim for compensation was not sustainable.

145. Finally, the appellant is entitled to a Certificate of Service for the duration served by dint of Section 51 of the *Employment Act* as directed by the trial court.

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

147. Parties shall bear their 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