Ongubo v Nyangena Hospital Ltd (Appeal E029 of 2024)
[2025] KEELRC 1279 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1279 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E029 OF 2024

JK GAKERI, J

MAY 5, 2025

BETWEEN

GLADYS MORAA ONGUBO ..... APPELLANT

AND

NYANGENA HOSPITAL LTD ..... RESPONDENT

(An appeal against the Judgment of Hon. P.K. Mutai SPM delivered on 6th November, 2023 at Kisii MC ELRC No. E012 of 2022)

JUDGMENT

1. This is an appeal against the Judgment of Hon. P.K. Mutai SPM delivered on 6th November, 2023 at Kisii MC ELRC No. E012 of 2022, Gladys Moraa Ongubo V Nyangena Hospital Ltd.

2. By way of background, the appellant alleged that she was employed by the respondent in 2002 as an Account's Clerk and her salary rose from Kshs.2500 per month to Kshs.28,500 and served diligently until her employment was unlawfully terminated on 1st October, 2021 vide a letter of non-renewal of contract of even date and was not paid terminal dues.

3. The appellant prayed for a declaration that termination of employment was unfair, Kshs.727,131.23 as terminal dues, costs of the suit and interest at court rates.

4. The respondent admitted having employed the appellant in 2002, as an Accounts Clerk but denied having terminated her employment unlawfully.

5. The respondent's case was that the appellant was serving under a fixed term contract which lapsed on 31st October, 2021 and it had been concluded after consultations.

6. After considering the evidence adduced by the parties and their submissions, the trial court found that the appellant was serving under a fixed term contract which the respondent did not renew.

7. The court directed the respondent to issue a certificate of service to the appellant and each party was to bear its own costs of the suit.

8. This is the judgment appealed against.

9. The trial court is faulted on seven (7) grounds set out in the Memorandum of Appeal.

10. The appellant contends that the learned trial Magistrate erred in law and fact by:

    1. Disregarding apparent evidence on record and failing to appreciate that there were two separate and concurrent contracts between the parties (oral and written) and thus full into error by making a decision on one and leaving the other.

    2. Not holding the Respondents act of forcing the appellant to sign the fixed term contract amounted to unfair termination of the oral contract.

    3. Not holding that the respondent's act of forcing the appellant to sign 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 respondents act of altering the appellant's term of contract from permanent to fixed term amounted to unfair labour practice.

    5. Failing to appreciate the purpose of Section 50 of the *Employment Act* in determining the appellant's complaint, especially the nineteen (19) years of service.

    6. Failing to appreciate the evidence on record and parties submissions especially the respondent's concession of fact that the appellant was employed in 2002 (the respondent admitted as having employed the appellant in 2008 in its Amended Statement of Defence dated 23rd June, 2022).

    7. Disregarding the appellant's written submission on record.

11. The appellant prays for Orders that:

    i. Termination of the appellant's employment was unfair.

    ii. Award Kshs.2,800,745.20 as compensation for unfair termination of employment.

    iii. Two certificates of service.

    iv. Costs of the appeal.

Appellant's submissions

12. As to whether the trial court failed to appreciate the purport of Section 50 of the *Employment Act* on the appellant's length of service, counsel for the appellant argued that the appellant had served for 12 years (not 19 years) and cited provisions of the *Employment Act* on redundancy to urge that the respondent coerced the appellant into signing the one year contract to avoid paying her severance pay. Reliance was placed on the sentiments of the court in Thomas & Piron Grand Lacs Ltd V Momanyi [2024] KEELRC 2186 (KLR) to submit that the appellant was entitled to severance pay duration served.

13. Significantly, the appellant had not pleaded that she was declared redundant or prayed for severance pay.

14. As to whether there were two separate and concurrent contracts of employment between the parties, counsel submitted that the respondent unilaterally and coercively imposed a one (1) year fixed term contract on the appellant disregarding the pre-existing oral agreement.

15. Reliance was placed on the decision in Symon Wairobi Gatuma V Kenya Breweries Ltd & 3 Others [2024] KESC 52 (KLR) to urge that a unilateral variation of employment terms constitutes a breach of the employment contract.

16. Counsel submitted that the coercion was exacerbated by threats that salary would not be paid to urge that the trial court fell into error by failing to acknowledge the existence of the oral contract.

17. Counsel further submitted that the respondent's action amounted to a fundamental breach of fair labour practices and cited the decision in Milton M. Isanya V Aga Khan Hospital Kisumu [2017] eKLR.

18. On unilateral variation of a contract of employment counsel urged that the appellant's right to fair labour practices were violated and the coercion could render the contract violable.

19. As to whether the trial court erred in 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, counsel contended that the appellant was compelled under duress to enter into a written fixed term contract at the behest of the respondent.

20. That she was threatened that accumulated salary arrears from previous years would not be paid.

21. Reliance was placed on the decision in Kabue V Co-operative Bank of Kenya Ltd [2014] KEELRC 2271 (KLR), to urge that for a termination of employment to be deemed fair there must have been a valid and fair reason and a fair procedure to submit that the introduction of the fixed term contract was not a renegotiation by an unconscionable conduct to deny the appellant her benefits.

22. Counsel urged the court to affirm that the respondent's coercive act resulted in an unlawful termination of the appellant's oral contract.

23. As to whether the alteration of the terms of employment from permanent to fixed term amounted to unfair labour practice, counsel for the appellant submitted that the coercion of the appellant by the respondent to sign the contract amounted to an unfair labour practice under Article 41 of the *Constitution* of Kenya.

24. Reliance was placed on the decisions in Elizabeth Wacheke and 62 Others V Airtel Networks (K) Ltd and Another [2013] eKLR on fairness in employment relations and Ruth Gathoni Ngotho Kariuki V The Registered Trustees of Presbyterian Church of East Africa & Another [2012] eKLR, to urge that employers must not exploit employees vide unfair modification or inequitable employment terms.

25. Counsel submitted that the alteration of the appellant's contract amounted to an unfair labour practice and the court should find that the appellant's right to fair labour practices was violated.

Respondent's submissions

26. On the role of the first appellate court on findings of fact by the trial court, reliance was placed on the sentiments of the court in Nkube V Nyamiro [1983] KLR 403.

27. Concerning the two current contracts of employment, counsel for the respondent submitted that the issue was raised on appeal and had not been pleaded in the lower court and parties are bound by their pleadings and cannot introduce new evidence at the appeal stage.

28. It was submitted that Section 2 of the *Employment Act* provided for oral and written contracts and parties are bound by the terms of their contract.

29. Reliance was placed on the sentiments of the Court in Kenya Plantation and Agricultural Workers Union V Kenya Cuttings Ltd [2013] to urge that the appellant entered into a written contract on 1st November, 2020 for one (1) year after being sensitized on the contract as per the internal memo dated 13th October, 2020 and the appellant did not dispute the same.

30. On the alleged duress or coercion, counsel submitted that it was an afterthought, introduced on appeal, which is not the case, as the issue arose during the hearing, the appellant's counsel submitted on it before the trial court and the court made a finding of fact.

31. Counsel submitted that the appellant admitted having signed the contract, adduced no evidence of coercion and never questioned the terms of the contract or raise concerns or reservations during its subsistence.

32. Reliance was placed on the sentiments of the court in Aristide Marege Nyang'au v Lavington Security Ltd [2021] eKLR on coercion and its requirements as were the sentiments in Wanchanga V Revere Technologies Ltd [2024] KEELRC 2135 (KLR) and Bunyi V Saab Kenya Ltd [2023] KEELRC 3228 (KLR) to submit that the allegation of coercion had been substantiated.

33. As to whether termination of the appellant's employment was lawful, counsel submitted that the contract dated 1st November, 2002 was for one (1) year and the applicant understood clause 3.2 and 8.7 of the contract and there was no obligation by the respondent to renew it after expiry and the appellant did not contest the terms of the contract.

34. Reliance was placed on S. S. Merita & Sons Ltd V Saidi Abedi Mwanyenga [2021] eKLR, Margaret A. Ochieng V National WateR & Pipeline Corporation [2014] eKLR and the Court of Appeal decision in Registered Trustee of Presbyterian Church of East Africa & Another V Ruth Gathoni Ngotho [2017] eKLR, to urge that a fixed term contract carries no rights, obligations or expectations beyond the expiry date and non-renewal does not amount to unfair termination.

35. Counsel submitted that in the instant case, the contract of employment ended by effluxion of time.

36. On the claim for overtime and public holidays, Kshs.782,994.60 and Kshs.87,000 respectively, counsel submitted that no specific periods in which the appellant worked overtime was pleaded or overtime was not paid, that the claim for overtime was exaggerated and the appellant worked from 2008 not 2002.

37. Reliance was placed on the decisions Ragoli Ole Manaideigi V General Cargo Services Ltd [2016] eKLR, James Orwaru Nyaundi V Kilgoris Klassic Sacco Ltd [2022] eKLR and Apex Steel Ltd V Dominic Mutua Muendo [2020] eKLR to urge that claims for overtime and public holidays must be pleaded and proved to justify the amount claimed.

38. Counsel submitted that in the instance case the appellant did not plead the specific days when she worked overtime and on public holidays.

39. Sentiments of the court in Monica Wanza Mbavu V Roofspec & Allied Works Co. Ltd [2021] eKLR were also relied upon.

40. On rest days, counsel cited the provisions of Section 27 of the *Employment Act* on the employer's mandate to regulate working hours subject to at least one (1) rest day per week, to urge that the appellant admitted that she worked for six (6) days per week and the claim for Kshs.417,594.12 was unproven.

41. On service pay, reliance was placed on Section 35(5) and (6) of the *Employment Act* to urge that the appellant was a registered member of the National Social Security Fund (NSSF) and no service pay was due to her.

42. Reliance was placed on the sentiments of the court in Elijah Kipkoros Tonui V Ngara Opticians t/a Bright Eyes Ltd [2014] eKLR, Ndung'u Kiarie Weithaga Farmers Extension Ltd [2022] eKLR and Lilian Muende Nzabu V Trustees and Office Bearers of Diocese of Anglican Church of Kenya [2018] eKLR, to submit that service pay was only payable to employees who are not covered by any social security structure including NSSF and the amounts deducted from an employee must be remitted to the NSSF failing which the NSSF Board is responsible for its recovery.

43. On leave, reliance was made on Section 90 of the *Employment Act* 2007 to urge that a claim for leave pay prior to 2008 was statute barred.

44. Counsel submitted that evidence showed that the appellant proceeded on leave in 2018, 2019, 2020 and 2021.

45. Reliance was placed on the decisions in Kengo Bakari Mwandogo V Kalu Works Ltd [2020] eKLR on the need to file the suit within 12 months after cessation of the continuing injury, as was the Court of Appeal decision in G4S Security Services (K) Ltd V Joseph Kamau & 468 Others [2018] eKLR.

46. Finally, on the one (1) months salary in lieu of notice, it was submitted that since the appellant admitted having received the non-renewal notice dated 1st October, 2021, the claim for pay in lieu of notice was unsustainable.

47. Reliance was placed on the decision in Anytime Ltd V Fredrick Mutobera Omuranya [2022] eKLR.

Analysis and determination

48. This being a first appeal, the function of the court is that of a retrial as the court is enjoined to reconsider and re-evaluate the evidence on record and arrive at its own conclusions being mindful that it has neither seen nor heard the witnesses and making due allowance in that respect, as held in Selle and Another V Associated Motor Boat Co. & Others [1968] EA 123, and Peters V Sunday Post Ltd [1958] EA 424.

49. In Mursal & Another V Manese (Suing as the Legal Administrator of Dalphine Kanini Manesa [2022] KEHC 282 (KLR) Mativo J (as he then was) stated as follows:

> A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & another V Associated Motor Boat Co. Ltd.& others and in Peters V Sunday Post Limited.

50. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court..."

51. I have considered the appeal and submissions by the parties.

52. The pith and substance of the appellant's case, in the court's view, resolves around how the trial court appreciated and applied the evidence and its disregard of the appellant's submissions.

53. It is common ground that the appellant was employed by the respondent sometime in 2008 as admitted by the respondent and served diligently until the events of October 2020.

54. Documents on record reveal that by an internal memo dated 13th October, 2020, the respondent invited all its employee to a sensitization and signing of contracts 2020 – 2021 slated for 15th October, 2020, for subordinate staff and 20th October, 2002 for nurses, pharmacy technologists MOS and laboratory.

55. The appellant signed the attendance sheet at serial number 28.

56. However, at the hearing, the appellant denied having seen the memo on the notice board but could not explain how she ended up signing the attendance sheet.

57. On cross-examination, the appellant admitted having signed the contract of employment but added that she signed it under coercion, an allegation she admitted not having indicated in her witness statement.

58. A copy of the contract of employment on record shows that the appellant signed it on 28th November, 2020.

59. She testified that she did not go through the document thoroughly and signed it because of her salary.

60. Counsel for the appellant contended that the trial magistrate erred by not appreciating the fact that there were two contracts of employment between the parties, and as correctly submitted by counsel for the respondent, the issue of the number of contracts was not raised before the trial court or emerge from the hearing.

61. Before the trial court, counsel for the appellant submitted that the appellant's employment was terminated on 1st October, 2021, but acknowledged that the appellant signed a new contract under coercion and was not given ample time to read through.

62. The other issue submitted on was compensation for leave days. Other reliefs were not submitted on.

63. On the two contracts, it is clear that the issue was not pleaded nor submitted on before the trial court.

64. It is trite law that parties are bound by their pleadings as held by the Court of Appeal in Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & Others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) V Nigeria Breweries PLC sc 91/2002 where Adereji JSC stated:

> ...It is now a settled principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...
>
> In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issue as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation"

65. The decision of the Tanzanian Court of Appeal in Salim Said Mtomekela V Mohamed Abdallah Mohamed, Civil Appeal No. 149 of 2019, has also been cited for the foregoing proposition of law.

66. In Ndishu & Another V Muriungi [2022] KEHC 2 (KLR) Mativo J (as he then was) stated:

> ...Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[21] Once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail unless amendments are granted. See Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385 and Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183"

67. In the end, having not pleaded that there were two concurrent contracts of employment with different or similar terms, the appellant could not fault the learned trial magistrate for failing to appreciate an unpleaded issue.

68. More significantly, however, evidence on record reveal that the appellant signed a new contract on 28th November, 2020 effective 1st November, 2020 to 31st October, 2021 and as correctly submitted by the respondent's counsel, the appellant did not raise any concerns, reservations or contest any of the terms of the contract.

69. On cross-examination the appellant admitted that she told about the new contract in October 2020, gave her lawyer the contract and signed the contract but alleged that there was a lot of pressure. She also admitted that she had no evidence of coercion.

70. Strangely, neither the appellant's statement of claim dated 14th April, 2022, nor the written witness statement of even date allege or allude or advert to the alleged coercion or pressure. It only came up during cross-examination and no particulars were provided.

71. Who coerced the appellant to sign the contract of employment on 28th November, 2020, where and how and what did the appellant do?

72. The court finds it implausible that the appellant could on 19th July, 2023 recollect having been under pressure to sign a contract on 27th November, 2020, but could not recollect the same on 14th April, 2022 when she instructed her counsel and signed the written witness statement or at any other time prior to the hearing and did not raise the issue with anyone at anytime during and after serving under the one (1) year contract.

73. The trial court was explicit that:

> I find no evidence to suggest that the claimant was coerced to sign the said contract. There is no evidence to show that she was not given sufficient time to read the document".

74. The trial court is assailed for not finding that there was coercion by the respondent.

75. Puzzlingly, counsel has not demonstrated as to who coerced the appellant, where and how or how the appellant responded and as held in Steve Mutua Munga V Homegrown Kenya Ltd & 2 Others [2013] eKLR cited in Aristide Marege Nyangau V Lavington Security Ltd (Supra), that coercion must be pleaded with clarity and established with precision.

76. As held Bunyi V Saab Kenya Ltd (Supra), duress comprises actual or threats of harm or personal injury or imprisonment. However, duress typically consists of threats to commit a crime or tort.

77. Duress or coercion vitiates consent as it denies a party free agency to contract. However, the party relying on duress must prove it by showing that it was exerted by the other party to the contract. All attendant circumstances must be laid bare.

78. In Occidental Worldwide Investment Corporation V Skibs A/s Avanti [1976] Lloyds Report 293 at 336 Kerr J. Observed that

> There must be present some factor, which would in law be regarded as a coercion of his will so as to vitiate his consent".

79. Similarly, in Barton V Amstrong [1975] 2 WLR 1050, 2 ALLER 465 Lord Simon of Glaisdate stated as follows:

> In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest, whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters, are as was recognized in Maskell V Horner [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not".

80. These sentiments are persuasive as they demonstrate the onus on the part of the person alleging coercion or duress.

81. In the instant case other than the statements made in court that:

> I Can see I signed it. It was under coercion... I signed because of my salary. I was not given enough time".

82. There is no other allegation or reference to the alleged coercion. Would a threat not to pay an employee salary constitute duress bearing in mind that it is neither a crime nor a tort and is not directed at a person's body.

83. In the court's view a threat not to pay salary does not qualify as duress as it's a breach of the contract of employment for which the employee has an adequate legal remedy.

84. Having failed to plead and demonstrate particulars of the alleged coercion, the court is in agreement with the finding of the trial court that there was no sufficient material before the court for a finding that the appellant was coerced to sign the fixed term contract.

85. Even assuming that the appellant under pressure, why did she not avoid the contract?

86. Coercion, at common law renders a contract voidable at the option of the party alleging to have been coerced. The appellant took no step to avoid the contract of employment and by conduct acquiesced to the respondent's action, if there was any coercion and cannot arguably raise the issue after serving the entire term of the contract by dint of the doctrine of estoppel by conduct.

87. Having found that the appellant failed to prove the alleged coercion, it is the further finding of the court that the appellant was serving the respondent as a cleaner under a fixed term contract.

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

89. The Court of Appeal decisions in Registered Trustees of Presbyterian Church of East Africa & Another V Ruth Gathoni Ngotho (Supra), 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 [2023] eKLR are unambiguous that a fixed term contract is for the term agreed upon by the parties and there is no obligation on the part of the employer to renew the contract unless the contract itself creates such an obligation or the employer's conduct creates the impression that renewal was forthcoming, where the employee could invoke the doctrine of reasonable expectation.

90. Similarly, the employer is not obligated to provide a notice of termination unless the contract so provides.

91. In the instant case, the respondent gave the appellant a non-renewable notice dated 1st October, 2021 and had not intimated that renewal was forthcoming.

92. Closely related to the foregoing is the issue whether the respondent unilaterally altered or varied the terms of the appellant's contract of employment. While the appellant argues that there were no consultations, the respondent contends that there was and the appellant attended and signed the attendance sheet. As adverted to elsewhere in this Judgment, although the appellant testified that she did not see the internal memo on the sensitization, she did not deny having attended the meeting or that it did not take place.

93. RWIII, Edna Cherono confirmed on cross-examination that employees were sensitized on the new contracts.

94. Bearing in mind that the appellant and the respondent did not have a written contract between them, it could only be implied form their conduct and its terms were provable by evidence.

95. The contract of employment on record is the agreement the parties entered into and signed later.

96. Contracts are underpinned on the theory of freedom of contract which is to the effect that parties are free to enter into any contractual relationship of their choice provided it is legal and any attendant formalities are complied with.

97. Concomitantly, parties are free to incorporate the terms they have agreed upon.

98. The downside of the theory of freedom of contract is that it is grounded on the assumption that there is parity in bargaining contractual relationships, which is seldom the case, as in most instances one party is more dominant and imposes terms on the other.

99. This scenario is exemplified by the employment relationship where the employer generally dictates the terms of the employment contract.

100. However, as long as there is an agreement between the parties entered into voluntarily, the parties are bound by its terms.

101. In written contracts, the signatures of the parties establishes that they were privy to the contract.

102. At common law, signature prima facie means acceptance. See L'Estrage V Grancob [1934] 2 KB 394.

103. In Parker V South Eastern Railway Co 2 C.P. D. 416, 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 know its contents".

104. Similarly, in L'Estrage V Graucob (Supra) Scrutton L J said:

> 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 whether he has read the document or not".

105. In the instant case, the appellant admitted on cross-examination that he signed the contract of employment and though she alleged being under pressure in court, which, in the court's view was an afterthought, she was bound by the terms of the contract as she failed to establish that her signature was procured by duress or undue influence.

What happened to the earlier employment contract?

106. When the parties agreed to enter into a new contract of employment effective 1st November, 2020, the terms of the earlier contract were merged or amalgamated with those of the new contract thereby discharging the earlier contract. Thus, the earlier contract did not have an existence thereafter.

107. The upshot of the foregoing is that there was only one contract of employment between the appellant and the respondent, executed by both parties and whose clause 3.1 was explicit that it was for a period of one (1) year effective 1st November, 2020 to 31st October, 2021, and it was non-renewable and terminated upon cessation of the agreed term.

108. As to whether the respondent unilaterally altered the terms of the contract of employment between the parties, the answer is in the negative account that as adverted to elsewhere in this Judgment, the respondent adduced credible evidence of having invited and sensitized its employees on the new contract of employment and the appellant signed the attendance sheet and subsequently signed the contract on 28th November, 2020, by which time her salary for October had already been paid and had been accorded sufficient time to think through the new contract and had the opportunity to seek independent advise as necessary and did as admitted in court.

109. In the court's view, there was no evidence of a unilateral variation or alteration of any contract. The parties merely agreed to reduce the terms of the contract of employment into a written form and its terms were agreed upon.

110. Having failed to prove coercion or duress, the appellant cannot allege that her right to fair labour practices under Article 41 of the *Constitution* of Kenya was violated.

111. Similarly, the one (1) fixed term contract terminated by effluxion of time as the trial court found and the non-renewal did not amount to an unfair termination of employment.

112. The foregoing disposes of ground 1, 2, 3, 4, 5 and part of ground 6 of the Memorandum of Appeal.

113. On submissions, the appellant's counsel faults the learned trial magistrate for failing to appreciate the submissions and disregarding the same altogether.

114. In her submissions before the trial court, the appellant addressed two issues namely; whether termination of employment was unlawful and unprocedural and whether the appellant was entitled to compensation for the unfair termination and compensation for leave days.

115. In his Judgment the learned trial magistrate, at page 2, states "I have considered the pleadings and the written submissions filed" and addressed two issues namely; whether the claimant was unlawfully dismissed and whether she was entitled to the reliefs sought.

116. The respondent addressed similar issues.

117. Regrettably, in her submissions, the appellant was silent as to what the learned trial magistrate ignored in those submissions having addressed similar issues and made findings.

118. It is trite law that submissions are neither pleadings nor evidence as held in Erastus Wade Opande V Kenya Revenue Authority & Another HCCA No. 46 of 2007, Nancy Wambui Gatheru V Peter W. Wanjere Ngugi HCC. No. 36 of 1993 and Ng'ang'a & Another V Owiti & Another [2008] KLR.

119. Finally, in Daniel Toroitich Arap Moi V Mwangi Stephen Mureithi & Another the Court of Appeal stated:

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

120. Having failed to particularise what aspects of the submissions the trial court did not consider, the court is satisfied that the learned trial magistrate did not fall into error on this aspect.

121. The foregoing disposes of grounds 6 and 7 of the Memorandum of Appeal.

122. Concerning the reliefs prayed for the trial court found that the appellant was not entitled to any of them save for the certificate of service which the appellant had not prayed for.

123. As regards the declaration that termination of employment by the respondent was unfair, the court is in agreement with the findings of the trial court that the appellant's employment was not terminated unfairly. It lapsed on account of effluxion of time.

124. On service pay, the provisional NSSF statement dated 4th October, 2021 reveals that the appellant was a registered member of the NSSF number 738039810 and deductions were submitted to the NSSF from January 2004 to August 2021, a fact the appellant admitted on re-examination.

125. The claim for service pay is disqualified by dint of Section 35(6)(d) of the *Employment Act*.

See Elijah Kipkoros Tonui V Ngara Opticians t/a Bright Eyes Ltd (Supra).

126. Relatedly having found that the appellant's contract of employment dated 1st November, 2020 terminated by effluxion of time and thus the non-renewal of the contract did not amount to an unlawful or unfair termination of employment, the claim for compensation would not arise.

127. As regards public holidays, the appellant adduced no evidence to demonstrate on which particular public holidays she was at the workplace and was not paid.

128. Neither the claim nor the written witness statement make reference to the days or period when the appellant worked on public holidays.

129. It is trite law that he who alleges must adduce evidence to establish the allegations.

130. The claim lacked supportive evidence to sustain.

131. A similar fate befalls the claim for salary in lieu of notice. This is because the appellant's contract of employment terminated on account of effluxion of time and the respondent was under no legal obligation to give a notice of termination. The notice of non-renewal of the contract was sufficient although it was not a legal requirement.

132. The claim for rest days, Kshs.223,999.20 is based on the assumption that the appellant worked without rest days, contrary to the provisions of the *Employment Act*.

133. The appellant's written statement is silent on the claim. However, on cross-examination, the appellant testified that she used to work for six days per week.

The claim was unproven.

134. Similarly, the claim for overtime, Kshs.2,800,745.20 was based on the assumption that the appellant worked for 4 extra hours every day for the entire duration of employment, yet, neither the written witness statement nor the oral evidence adduced in court made reference to any extra hours worked or when and was not paid for.

135. On cross-examination, the appellant confirmed that her written statement lacked particulars as to when she worked overtime.

136. The appellant adduced no evidence as to when she would report to and exit the work place. The claim was unmerited for want of particulars.

137. As regards leave, the appellant testified that although previously there was no leave, she proceeded on leave in 2020 and 2021.

138. She also admitted that the written witness statement did not show that he had taken leave in 2020 and 2021.

139. Documents on record show that the appellant proceeded on leave in 2020 and 2021 and was paid Kshs.51,000 for untaken leave days for 2018 and 2019.

140. If the appellant did not proceed on leave in the years preceding 2018 and was not paid for the untaken leave days, no payment is merited since the instant suit was commenced in April, 2022 more than 12 months after cessation of the injury or damage under Section 89 of the *Employment Act*.

141. Finally, the amount claimed as gratuity is unspecified and the appellant adduced no evidence to prove that she was entitled to gratuity.

142. As held in Bamburi Cement Ltd V William Kilonzi [2016] eKLR, gratuity is an amount paid to the employee gratuitously in appreciation of the services rendered and is payable at the discretion of the employer unless it is provided for by the contract of employment or the Collective Bargaining Agreement (CBA).

143. In the instant case, the appellant's contract of employment had no provisions for gratuity and it was unmerited.

144. From the foregoing, it is decipherable that the instant appeal is for dismissal and it is accordingly dismissed.

145. 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

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