Osebe v Nyangena Hospital Limited (Appeal E033 of 2024)
[2025] KEELRC 1272 (KLR) (5 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1272 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E033 OF 2024

JK GAKERI, J

MAY 5, 2025

BETWEEN

MIRIAM MOSASA OSEBE ..... APPELLANT

AND

NYANGENA HOSPITAL LIMITED ..... RESPONDENT

JUDGMENT

1. By a statement of claim filed on 21st April, 2022, the appellant sued the respondent alleging unlawful termination of employment as the dismissal was without notice.

2. The appellant sought a declaration that termination of employment was unfair, payment of terminal dues, amounting to Kshs.606,437 for the duration served, costs and interest.

3. The appellant averred that she served for 7 years and her salary rose from Kshs.6,000 to Kshs.13,000.

4. On its part, the respondent admitted having employed the appellant in 2013 as a subordinate staff and denied having terminated the appellant's employment unlawfully stating that her employment contract ended by effluxion of time as it was a fixed term contract.

5. Both parties filed submissions on 8th September 2023 and 2nd October, 2023 respectively and after considering the evidence and submissions, the learned trial Magistrate found that there was no unlawful termination of employment and the appellant was not entitled to the reliefs sought but awarded a certificate of service.

6. This is the decision appealed against.

7. The appellant faults the trial on the ground that it 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 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.

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

5. Failing to appreciate the purport of section 50 of the *Employment Act* in determining the appellant's compliant and failing to appreciate the length of the appellant's service of over, nineteen (19) years.

6. Failing to appreciate the evidence on record and the parties submissions especially the respondent's concession that the appellant had been in employment since 2014.

7. Totally disregarding the appellant's submissions on record occasioning miscarriage of justice.

8. 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, Kshs.606,437 as compensation, two certificates of service and costs of the appeal.

9. While six (6) grounds of the memorandum appeal are on the trial court's failure to appreciate and apply the evidence on record, the last ground is specific to submissions.

Appellant's Submissions

10. On failure to appreciate the appellant's length of service under Section 50 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) on severance pay was cited as authority.

11. As regards to two contracts, counsel urged that the appellant served under an oral contract from 2009 till 2020 when the respondent unilaterally coerced the appellant to sign a one (1) year fixed term contract.

12. 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.

13. Counsel submitted that the appellant was coerced by threats of non-payment of salary.

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

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

16. 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.

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

18. Reliance was placed on the decision in Kabue V Co-operative Bank of Kenya (2021) KEELRC 2271 (KLR) on the elements to a fair termination of employment, to urge that court ought to find that the unlawful termination of an oral contract was an unfair labour practice.

19. 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.

Respondent's Submissions

20. 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.

21. 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.

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

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

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

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

26. 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 claim unfair or unlawful termination of employment.

27. As regards the reliefs sought counsel submitted that none is 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 do so.

28. 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 Orwani Nyaudi V Kilgoris Klassic Sacco Ltd (2022) eKLR, Apex Steel Ltd V Dominic Mutua Muendo (2020) eKLR and Monica Wanza Mbavu V Rootspec Allied Works Co. Ltd (2021) eKLR, on claims for overtime and holiday pay and proof.

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

30. 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 unless it is a continuing injury or damage.

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

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

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

Analysis and determination

34. I have considered the appeal, submissions by the parties and the authorities cited. This being a first appeal, the court is enjoined to reconsider and re-evaluate the evidence a fresh and make its own conclusions.

35. Put differently and as courts have held, the first appeal is a retrial of the case.

36. In Selle and Another V Associated Motor Boat Co. Ltd & Others [1968] EA 123 the Court of Appeal stated:

> ...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. Briefly put they are that this court must reconsider the evidence, evaluate 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..."
>
> (See also Mwanasokoni V Kenya Bus Services Ltd [1985] KLR 931 and Gitobu Imanyara & 2 Others V Attorney General [2016] eKLR among others).

37. As mentioned earlier, the trial court is largely faulted on matters of evidence and it is incumbent upon the court to re-evaluate the evidence a fresh.

38. Although the appellant pleaded that she was employed from 2002, the written witness statement dated 14th April 2022 has no employment date.

39. However, the respondent pleaded and its witness testified that the appellant was appointed in 2013.

40. Similarly, although the statement of claim alleges that she was employed as a nurse, her witness statement is silent on the position but on cross-examination she admitted that she was not a nurse.

41. In her written witness statement signed about 6 months after the alleged unlawful termination of employment, the appellant makes no reference to the alleged duress, coercion or threats.

42. Equally, the statement is silent on overtime, untaken leave days, oral contract, rest days, public holidays and membership of the National Social Security Fund (NSSF).

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

44. Strangely, the issue of duress, coercion or threats only came up in the course of cross-examination when the appellant stated that: "I was forced to sign contract"

45. As neither the appellant's written statement nor the statement of claim or other document allege that she was forced to sign the employment contract, the six word sentence on record lacks a context as to where, when, how and by whom the coercion was exerted.

46. The appellant desires to persuade the court that some unnamed person forced her to sign a contract in an unknown manner and place, and the appellant did not resist irrespective of its form or degree, and could not remember the fact of being forced when she instructed her advocate, signed the witness statement while serving under the contract or after, but her citing moment came in court on 19th July, 2023 during cross-examination.

47. Strangely, counsel for the appellant did not question the respondent's witnesses on the issue of the alleged coercion.

48. It is not in dispute that the appellant attended the sensitization meeting on 13th October, 2023 and signed the attendance sheet as serial number 4, yet during cross-examination, the appellant testified that she neither saw the notice nor was she informed about the contract.

49. Although the respondent did not file a copy of the minutes of the meeting or a report on what transpired, the appellant did not deny that it took place or that the subject matter of the meeting was different.

50. Evidence on record reveals that the appellant signed the contract of employment on 26th November, 2020 and confirmed that the effective date of employment was 1st June, 2013.

51. In the written submissions dated 4th September, 2023, counsel for the appellant submitted that the appellant was coerced to sign the one (1) year contract on the ground that if she failed to do so, she would not receive her salary for October 2020.

52. It is unclear to the court where the evidence of the alleged threat came from as none is on record and even assuming it was true, the appellant signed the contract of employment on 26th November, 2020, long after the salary for October 2020 had fallen due and payable.

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

54. There is no scintilla of evidence to demonstrate or suggest that the contract of employment dated 1st November, 2020, signed by the appellant on 26th November, 2020 was vitiated by duress.

55. At common law signature prima facie means acceptance. It denotes acceptance or agreement and binds the signatory 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).

56. 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".

57. 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 when he has read the document or not".

58. 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 pleading it nor mentioning it in her witness statement.

59. 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 droning man will clutch at a straw'.

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

61. 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.

62. 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.

63. 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.

64. 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.

65. In this case, the appellant did nothing about the duress she is alleging in court as she neither declined to sign the contract, sign it under protest nor raise the issue after signing the contract or 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.

66. 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.

67. 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.

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.

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

69. Although the appellant's counsel faulted the trial Magistrate for not holding that the appellant was coerced to sign the fixed term contract 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.

70. 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*.

71. Section 107 provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

72. Section 108 of the *Evidence Act* provides

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

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

74. 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 the presence of duress.

75. I conclude this part with the sentiments of the Court of Appeal in Pius Kimaiyo Langat V Cooperative Bank of Kenya (2017) eKLR that:

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

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

77. Similarly, the threat to withhold and employee salary does not amount to duress in law.

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

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

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

80. Issues for determination in cases emanate from the pleadings and a court can only pronounce itself on such issues. See Galaxy Paints Co. Ltd V Falcon Guards Ltd Court of Appeal case no. 219 of 1998, Adetoun Oladeji (NIG) Ltd V Nigeria Breweries P.L.C. SC91/2002 (sentiments of Pius Aderemi J. S C) cited in Joseph Mbuta Nziu 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.

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

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

82. 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?

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

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

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

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

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

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

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

    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.

90. 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 contracts came must later after the sensitization.

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

92. 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.

93. 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 she was invited for a

sensitization meeting, attended, signed the attendance sheet and subsequently signed the contract of employment.

94. 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.

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

96. 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.

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

98. 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.

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

99. 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 in addition to remaining at work, which amounted to express and implied acceptance of the new terms of employment.

100. 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.

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

102. 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.

103. 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 contracts submitted on by counsel.

104. 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 is alluding to.

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

106. 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 but to abide by its terms.

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

108. 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..."

109. 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..."

110. 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].

111. 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 (Supra) 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...

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

113. The issue was also 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).

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

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

115. The jurisprudence emerging from these 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.

116. 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.

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

118. 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 ended on account of effluxion of time.

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

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

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

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

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

124. The trial court expressed itself as follows:

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

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

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

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

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What happened is submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties "marketing language" each side endeavouring to convince the court that its case is the better one. Submissions we reiterate do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on the evidence presented".

128. The court is in agreement with these sentiments.

129. 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.

130. Concerning the reliefs prayed for the trial court found that the appellant was not entitled to any as none had been proved to be merited.

Salary for 8 years:

131. This claim lacks particulars and it is for dismissal as the appellant adduced no evidence of any unpaid salary for the duration of his employment. In addition, the amount claimed is uncertain.

132. Being a species of special damages, the salary owing if any, ought to have been pleaded and proved as held in Hahn V Singh [1985] KLR 716, Richard Okuku Oloo V South Nyanza Sugar Co. Ltd [2013] eKLR, Nizar Virani T/A Kisumu Beach Resort V Pheonix of East Africa Assurance Co. Ltd [2004] 2 KLR 269, Gulhamid Mohamedaji Jiwaji V Sanya Electrical Co. Ltd [2003] KLR 425 and Coast Bus Service Ltd V Sisco E. Murunga Nolanyi & 2 Others Civil Appeal No. 192 of 1992.

133. The claim was unsubstantiated was properly disallowed by the trial court.

134. As regards service pay, the respondent submitted that the sum of Kshs.45,680.00 prayed for was not payable as 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 Optician t/a Bright Eyes Ltd (Supra).

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

136. Significantly, evidence on record shows that the appellant was a registered member of the NSSF and the respondent was remitting deductions to the Fund.

137. The claim was properly declined by the trial court.

138. On pay in lieu of notice Kshs.11,420, having found that the appellant was serving under a fixed one (1) year contract of employment which lapsed on 31st October, 2021 as envisioned by the parties, the prayer for salary in lieu of notice was unsustainable as there was no unlawful or unfair dismissal or termination of employment.

139. The prayer was properly dismissed by the trial court.

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

141. As regards public holidays, a minimum of 10 per year, the prayer lacked the requisite particulars as to the specific public holidays on which the appellant was at work. The sum of Kshs.22,840 prayer for lacked supportive evidence.

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

143. The claim was unproven and declined.

144. The foregoing equally applies to the claim for rest days, Kshs.146,176.00 which is a blanket claim grounded on the assumption that the appellant worked 4 extra days per month for 8 years without fail.

145. On cross-examination, the appellant testified that that he worked for six (6) days per week and had one rest day and led no testimony of having worked on any of the rest days for the entire duration of her employment.

146. The claim lacked particulars and was dismissed.

147. As regards overtime, the appellant's witness statement was reticent on her having worked any extra hour at any time during her employment and was not paid.

148. Puzzlingly, the appellant only raised the issue of having worked overtime during re-examination by his counsel.

149. It is also notable that RWI, Dr. Stephen Matoke testified that overtime was on need basis and the respondent had availed evidence on payment for overtime.

150. The appellant's prayer was based on the assumption that she worked 4 extra hours daily for 30 days in a month for 8 years and was not paid and had no evidence of having claimed the same. The sum of Kshs.182,716.00 was unproven and disallowed as it lacked supportive evidence.

151. Finally, on leave the appellant prayed for 21 days per year for 8 years, Kshs.63,925.00.

152. The appellant's leave application forms on record reveals that she proceeded on annual leave in 2021, for a total of 24 days, was paid Kshs.10,200 for untaken leave days in 2020, paid Kshs.8,080 for untaken leave days for 2017/2018 and leave for 2018 was approved for June or July at her instigation.

153. On cross-examination, the appellant admitted that she proceeded on leave.

154. Based on the evidence before the trial court, the appellant's claim for leave for 8 years as opposed to for the untaken leave days if any was unsubstantiated.

155. In the end, the court is in agreement with the trial court that the appellant was not entitled to any of the reliefs prayed for.

156. In conclusion, this court is satisfied that the appellant's appeal lacks merit and it is accordingly dismissed.

157. However, the appellant is entitled to a certificate of service by dint of Section 51 of the *Employment Act* as directed by the trial court.

158. Parties shall bear own costs of this appeal.

It is so ordered.

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