



**Osoro v Nyangena Hospital Ltd (Appeal E028 of 2024)
[2025] KEELRC 1277 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1277 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E028 OF 2024**

JK GAKERI, J

MAY 5, 2025

BETWEEN

EVERLINE ONGUBO OSORO APPELLANT

AND

NYANGENA HOSPITAL LTD RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 22nd July, 2024, the appellant instituted the instant appeal against the Judgment of Hon. P.K. Mutai, Principal Magistrate delivered at Kisii in Kisii CMERLC No. 007 of 2022 Everline Ongubo Osoro V Nyangena Hospital Ltd.
2. As brief background, the appellant testified that she joined the respondent as an intern in 2003, left in 2006 and came back on 8th November, 2018 as subordinate staff served diligently until 31st October, 2021 when the one year contract dated 1st November, 2021 lapsed.
3. The appellant alleged that she was dismissed from employment by the respondent without notice and prayed for salary in lieu of notice, service pay, salary for 11 years, compensation, public holidays, rest days, overtime and leave pay.
4. The respondent's case was that the appellant joined as an employee in January 2006 left in June 2006 and later joined in 2018 and left when her one (1) year fixed term contract lapsed.
5. In her submissions, the appellant submitted that her dismissal was unlawful and unprocedural for non-compliance with the provisions of the [Employment Act](#) and was thus entitled to the reliefs sought.
6. The respondent on the other hand submitted that since the appellant had voluntarily signed a fixed term contract, the non-renewal by the respondent did not amount to an unlawful termination of employment and none of the reliefs sought was due to the appellant.



7. After considering the evidence and submissions, the learned trial magistrate found that the appellant served under a fixed term contract and was not unfairly terminated from employment.
8. The court awarded Kshs.10,000.00 for 21 untaken leave days and certificate of service and costs of the suit.
9. This is the Judgment the appellant has appealed against.
10. The appellant faults the learned trial magistrate on the grounds that, he erred in law and fact by:
 1. Disregarding the 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.

Appellant's submissions

11. On failure to appreciate the appellant's length of service under Section 50 of the [Employment Act](#), Counsel placed reliance the provisions of the [Employment Act](#) to urge that severance pay was due and cited the decision in Thomas & Piron Grand Loc's Ltd V Momanyi (2024) 2186 (KLR) on severance pay.
12. As regards the two contracts, counsel urged that the appellant served under an oral contract from 2009 till 2020 and the respondent unilaterally coerced the appellant to sign a one (1) year fixed term contract.
13. 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.
14. Counsel submitted that the appellant was coerced by threats of non-payment of salary and consequently the appellant was serving under an 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 appellant's right to a fair termination of employment, to submit that the court ought to find that the unlawful termination of the oral contract was an unfair labour practice.
19. In a similar vein, the decisions in *Elizabeth Washeke & 62 Others V Airtel Networks (K) Ltd & another (20130 eKLR)* and *Ruth Gathoni Ngotho Kariuki V PCEA & another (2012) eKLR* were relied upon to reinforce the submission that alteration of the appellant's contract by the respondent amounted to unfair labour practice. The latter was cited with regard to fixed term contracts.

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 of either service is 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 submitted that the respondent consulted the appellant and was sensitized on the new contract and signed it on 1st November 2020 thereby discharging the oral contract.
24. Reliance was also made placed on the sentiments of the court in *Aristide Marege Nyangau V Lavington Security Ltd (2021) KEELRC 959 (KLR)* to urge that the appellant signed the contract voluntarily and freely and had not pleaded coercion.
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 were 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 cannot claim unfair or unlawful termination of employment.
27. As regards the reliefs sought, counsel submitted that none was available to the appellant in that the claim for overtime was exaggerated, had no specific period and was based on a 7 days workweek yet the appellant did not work for 7 days in a week.
28. Sentiments of the court in *Ragoli Ole Manaideigi V General Cargo Services Ltd (2016) eKLR* were cited to urge that the claim was not based on any evidence as were those in *James Orwaru Nyaundi V Kilgoris Klassic Sacco Ltd (2022) eKLR*, *Apex Stallin V Dominic Mutua Muendo (2020) eKLR* and *Monica Wanza Mbaru V Rootspec Allied Works Co. Ltd (2021) eKLR*, on claims for overtime, holiday pay and proof.
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 the appellant was a member of the NSSF as held in *Elijah Kipkoros Tonui V Ngara Opticians t/a Bright Eyes Ltd.* (2014) eKLR, and *Ndungu Kiarie V Waithaga Farm Extension Ltd* (2022) eKLR and *Lillian Mwende Nzabu V Trustees and office Bearers of Diocese of Anglican Church of Kenya* (2018) eKLR.
30. Counsel further submitted that the amount of Kshs.10,000.00 awarded for unutilized leave days was undeserved on account that no specific period when leave was not taken was pleaded and the respondent provided the appellant's Leave Application Forms from 2019 to 2021, evidence the appellant did not controvert.
31. Counsel submitted that the appellant had prayed for payment for the period when she was on attachment and such claim would have been statute barred by dint of Section 90 of the *Employment Act* 2007 and the exception of continuing injury was inapplicable since the suit was filed in 2022.
32. Reliance was placed on sentiments of the court in *Kengo Bakari Mwandogo V Kaluworks Ltd* [2020] eKLR and *G4S Security Services (K) Ltd V Joseph Kamau & 468 Others* [2018] eKLR to urge the court to dismiss the claim for Kshs.69,300.00 for leave.
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* (2020) eKLR.

Analysis and determination

35. I have considered the appeal, submissions by parties and the authorities cited.
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 trial is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect”
39. See also *Mwanasokoni V Kenya Bus Services Ltd* (1985) KLR 931 *Selle & another V Associated Motor Boat Co. Ltd* (1968) EAA 123 and *Abok James t/a A. J. Odera & Association V John Patrick Macline t/a Machira and Co. Advocates* (2013) eKLR.
40. As adverted to elsewhere in this judgment, the memorandum of appeal largely faults the trial court on matters of evidence on record and it behoves the court to re-evaluate that evidence afresh.
41. Although the appellant alleged that she was employed from July 2003 to 2006, having previously been an intern, neither the statement of claim nor the written witness statement has the date of employment and evidence availed by the respondent shows that the appellant was on attachment from 14th April, 2004 to 17th June, 2004.



42. Finally, the contract of employment dated 1st November, 2020 shows that the appellant entered her date of employment by the respondent as 1st October, 2018, which in the court's view was the date of employment.
43. The appellants written statement dated 14th April, 2022 makes no reference to the circumstances in which the contract of employment was signed and the issue only arose during cross-examination when the appellant stated that she was threatened verbally and signed the contract to safeguard her salary as she would not have been paid if she did not sign. The appellant, however admitted that she did not state so in her witness statement.
44. The trial court found and held that the appellant had not adduced any evidence to show that she was coerced to sign the employment contract. This court is equally not persuaded that the learned trial magistrate erred on this issue of fact.
45. It would be overstretching imagination to surmise that a statement made in court at the instigation of counsel on a critical aspect of evidence neither pleaded or mentioned or raised during the subsistence of the employment relationship or at any other time prior to the hearing was credible.
46. The foregoing finds support in the fact that the appellant failed to provide any fact of the alleged verbal threat, including where, when how and by whom the threats was exerted.
47. This was essential because the respondent availed evidence to show the circumstances in which the appellant signed the employment contract.
48. Uncontroverted evidence revealed that the appellant and her colleagues were invited for a sensitization meeting vide letter dated 13th October, 2020 under reference "sensitization and signing of contracts 2020 – 2021" and attendance was mandatory and all had to sign the attendance list and the appellant signed the attendance sheet as serial number 8.
49. Although the respondent did not avail minutes of the meeting or a report, the appellant did not deny having attended the meeting or allege that the agenda was different.
50. Evidence on record reveals that the appellant signed the contract on 28th November, 2020 and thus accepted the terms and conditions there in, effective 1st October, 2018.
51. In the courts view, based on the evidence adduced by the appellant and the respondent there is no indication to show that the contract of employment dated and signed by the appellant on even date was vitiated by duress.
52. At common law signature prima facie denotes acceptance and the document signed binds the signatories unless it is proved by evidence that the signature was procured by misrepresentation, mistake, duress or undue influence. (See *L'Estrange V Graucob* (1934) 2KB 394
53. 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."
54. 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.
55. 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.



56. The threat must relate to bodily harm and person threatening must be capable of carrying it out and illegal as it must relate to the commission of a crime or a tort.
57. In a contractual setting, the violence or threat must have been exerted by the other party to the contract not a 3rd party.
58. Analogous to misrepresentation and undue inference, duress renders a contract voidable at the option of the affected party.
59. It is incumbent upon the party alleging to have been coerced to take steps to avoid the contract by opting out of the it or complaining about it or filing a suit.
60. In this case the appellant neither complained about the alleged duress or write about it nor sue the respondent during the currency of the employment contract, which in the court's view constituted acquiescence, if there was any duress.
61. The petitioner cannot purport to rely on the alleged duress after serving full contractual term. The doctrine of estoppel by conduct estops her from doing so as it would be unfair to the respondent. Having accepted the new terms of employment, and served the appellant is estopped from raising the issue of duress.
62. See *D & C Builders V Sidney Bees* (1966) 24B 617 cited in *John Mburu V Consolidated Bank of Kenya* (2018) eKLR.
63. In sum, duress cannot be relied upon *ex post facto* as the contract it allegedly vitiated does not exist.
64. Although the appellant's counsel faulted the trial magistrate for not holding that the appellant was coerced to sign the fixed term contract by the respondent and submitted vociferously on the issue, counsel regrettably, had no evidence to rely on in arguing that the appellant was coerced as neither the statement of claim dated 14th April 2022 nor the appellant's witness statement of even date or any other verifiable evidence was adduced in support of the alleged duress.
65. It is trite law that he who alleges is obligated to adduce evidence in support of the allegation as ordained by the provisions of Section 107, 108 and 109 of the *Evidence Act*.
66. 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.
67. Section 108 of the *Evidence Act* provides:

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

See *Alice Wanjiru Ruhii V Messiac Assembly of Yahweh* (2021) eKLR, *Ahmed Mohammed Noor V Abdi Aziz Osman* (2019) eKLR, *Gatirau Peter Many V Dickson Mwenda Kithinji & 3 others* (2014) eKLR and *SUT VTA* (2019) eKLR among others.
68. In the instant case, the appellant bore the burden of establishing that she was indeed coerced or threatened to sign the contract of employment but failed to lay before the court any material from which the courts could find or infer duress.



69. 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.”
70. The appellant neither pleaded nor proved coercion or any other vitiating element of the contract of employment and a threat to withhold and employee salary does not amount to duress in law.
71. See *Pao & others V Lau Yiu & another* (1979) 3ALLER. 65, and *Kenya Commercial Bank Ltd & another V Samuel Kamau Macharia & 2 others* (2008) eKLR.
72. The foregoing disposes of grounds 2 and 3 of the memorandum of appeal.
73. Concerning the oral and written contracts in force simultaneously or concurrently, the court is in agreement with the submission of the respondent’s counsel that the issue was neither pleaded nor raised in the trial court and parties are bound by their pleadings.
74. 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 Nzaiu 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.
75. 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.”
76. Following the appellant’s argument on the unpleaded issue, perhaps the issue for consideration is what happened to the oral contract the appellant had entered into with the respondent?
77. 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.
78. 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.
79. In the court’s view, there was only one contract of employment between the appellant and the respondent dated 1st November 2021, effective 2008.
80. Having voluntarily signed and served the one-year fixed term contract without avoiding or faulting it in anyway, the appellant cannot be heard to say that there was an oral contract of employment between her and the respondent and whose terms and conditions were not tabulated for the respondent’s rebuttal.



81. 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 in support of.
82. The foregoing disposes of ground number one of the memorandum of appeal.
83. On the alleged unilateral alteration of the contract of employment, it is trite law that a unilateral variation of a contract of employment by either party amounts to a breach of the contract or repudiation as held by the Supreme Court in *Symon Wairobi Gatuma V Kenya Breweries Ltd & 3 Others* (Supra).

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.
84. Although the appellant had not pleaded or testified that her contract of employment was unilaterally varied by the respondent, the respondent availed evidence to show that it sensitized the appellant with others on the new contract and signing of the contract took place after the sensitization.
85. The appellant attended the sensitization scheduled for 13th October, 2020.
86. 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.
87. Although the respondent is faulted for having unilaterally varied the terms of the employment contract from permanent to fixed term, the appellant did not deny that he was invited for a sensitization meeting, attended, signed the attendance sheet and subsequently signed the contract of employment.
88. 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.
89. Needless to gainsay, the respondent would have had a serious challenges if its employees, including the appellant had refused to sign the contract, which was within their right to do, but did not.
90. The appellant could, if he had any concerns about the contract or was forced sign do so under protest or write a letter or email to express his displeasure with the respondent's conduct.
91. The verbal allegation made in court during the hearing lacked supportive evidence and was of no probative value.
92. It is trite law, that an employee's consent to the variation of terms of a contract of employment need not be express. It can be implied and inferred from the conduct of the employee, including remaining in employment after the revised terms of employment are operationalized or signing the agreement containing the altered terms and conditions.
93. See *James Angama V Judicial Service Commission* [2017] eKLR cited in *Joseph Ngungu Wairiuko V Tassia Coffee Estates Ltd* [2022] eKLR.
94. Based on the evidence on record, it is the finding of the court that the respondent consulted the appellant and her colleagues before the new contracts of employment was operationalized on 1st November, 2020 and the appellant signed it, in addition to remaining in employment, which constituted an express and implied acceptance of the new terms of employment.



95. 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.
96. The other issue addressed by the parties is whether termination of the appellant’s employment was unfair or unlawful.
97. While the appellant submitted that signing of the new contract of employment amounted to an unfair termination of the oral contract, the respondent submitted that the appellant was serving under a fixed term contract and it lapsed by effluxion of time.
98. In his statement of claim, the appellant was challenging the termination of her employment at the end of October 2021 as opposed to the oral contract submitted on by counsel.
99. In her written witness statement, the appellant stated that her employment was unlawfully terminated on or about 1st October, 2021, and thus could not have been referring to the oral contract counsel submitted on.
100. Having found that there was only one contract of employment between the appellant and respondent on account of a merger on 1st November, 2020, and having further found that the appellant failed to prove that his signature on the contract of employment was procured by duress, misrepresentation, fraud or undue influence, the appellant was bound by the terms of the contract and had no other option but abide by its terms.
101. The principles that govern fixed term contracts are well settled.
102. 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...”
103. 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...”
104. 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].
105. In *Registered Trustees of Presbyterian Church of East Africa and Another V Ruth Gathoni Ngotho* (Supra) the Court of Appeal stated:

“Bearing the foregoing in mind, we note that fixed term contract carries no rights, obligations or expectations beyond the date of expiry. Accordingly, any claim based after expiry of the respondent’s contract ought not to have been maintained...

Similarly, since the respondent’s contract came to an end by effluxion of time any claim for wrongful termination could not be maintained”.
106. 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).



107. 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”

108. 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.

109. In addition, since the contract of employment comes to an end when its defined duration lapses, the employer is under no obligation to give reasons for the separation.

110. 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.

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

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

113. 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.

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

115. Before analysing the issues, the learned trial magistrate stated “I have considered the pleadings and written submissions filed”.

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

117. 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”.



118. These sentiments evince that the learned trial Magistrate addressed the question whether termination of the appellant’s employment was unlawful or unfair.
119. In the court’s view, it would be vexatious to find that the trial magistrate fell into error on the issue of submissions.
120. In *Daniel Toroitich Arap Moi V Stephen Mureithi & Another* [2014] eKLR, the court re-stated the role of submissions in a case as follows:
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What happened in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties “marketing language” each side endeavouring to convince the court that its case is the better one. Submissions we reiterate do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on the evidence presented”.
121. 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.
122. Concerning the reliefs prayed for, the trial court held that the appellant had not presented evidence to prove that he was entitled to any of them, save Kshs.10,000.00 for unutilized leave days which the respondent contests based on the evidence on record which reveals that the appellant was paid Kshs.10,000.00 for the untaken leave for 2018 – 2019, proceeded on leave in 2020 and her application for leave for 2020 – 2021 was approved for compensation as the contract was expiring in October 2021.
123. The appellant adduced no evidence to prove that she was not paid for unutilized leave days for 2021.
124. The award of Kshs.10,000.00 by the trial court was not supported by evidence and was unmerited.
125. The appellant prayed for salary of Kshs.9,000,000 for 11 years without particulars, as neither the written witness statement nor the oral evidence adduced in court provided the relevant particulars.
126. Having worked for about 3 years as evidenced by the contract of employment signed on 27th November, 2020, it is unclear as to when the appellant served such duration without payment as she tendered no evidence of any unpaid salary. This claim was unsubstantiated and thus unmerited.
127. As regards service pay, the appellant tendered no evidence to prove that NSSF deductions were not made.
128. The respondent on the other hand provided a copy of the appellant’s NSSF statement for the period 1/09/2018 to 31/08/2021 dated 5th October, 2021 showing that NSSF deductions were remitted from September, 2018 to August 2021, save for August 2020. The appellant was a registered member of the NSSF and thus not entitled to service pay by dint of Section 35(6)(d) of the *Employment Act*.
129. The claim was unmerited
130. As regards salary in lieu of notice, having found that the appellant’s employment contract terminated by effluxion of time and no notice was necessary, although one was issued, the claim was unmerited.
131. On unremitted NSSF deductions, the appellant’s written witness statement dated 14th April, 2022 makes no reference to any deducted but unremitted NSSF dues, period and the amount.



132. The claim lacked supportive evidence and was unmerited.
133. As to whether the appellant is entitled to payment for rest days, the simple answer is in the negative on account that the appellant adduced no evidence as to his work week or schedule.
134. More importantly, the appellant confirmed on cross-examination that she worked for 6 days in a week in accordance with Section 27 of the *Employment Act* which provides
- (1) ...
2. Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.
135. The claim was unmerited.
136. Concerning public holidays, the appellant led no evidence on the public holidays on which he was on duty and when.
137. The court cannot assume that the appellant was at work on every public holiday for the duration served.
138. 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.
139. Simply stated, the appellant threw figures and numbers to the court without supportive evidence in anticipation of an award.
140. The claim was unmerited.
141. Equally, the claim for overtime was based on the assumption that the appellant worked from 6:00am to 6:00am at 16 hours of overtime daily every day and months for the entire duration of employment.
142. If the claim is to be believed, the appellant spent all her time at the workplace and everything remained equal for the entire duration which is not feasible owing to vicissitudes of life which dictate otherwise.
143. The meticulously computed figure lacked supportive evidence as neither the statement of claim or written witness statement nor the oral testimony adduced in court attested to the fact of the appellant having worked overtime.
144. The claim was unmerited.
145. As regards leave, the claim is grounded on the assumption that the appellant did not proceed on leave even for a single day for the duration served, which ought to be supported by credible evidence that he was not allowed to proceed on leave or exigencies of duty prevented her from doing so.
146. As adverted to elsewhere in this Judgment, the appellant was paid Kshs. 10,000 for the untaken leave for 2018 – 2019, proceeded on leave in 2020 and her application for leave for 2020 – 2021 was approved for compensation as the contract was expiring in October 2021 and the appellant adduced no evidence to prove she was not paid.
147. The appellant did not controvert the respondent's evidence on leave.
148. The claim lacked supportive evidence and was unmerited.
149. The ward of Kshs.10,000.00 for untaken leave days is set aside.



150. As regards compensation for unfair termination, having found that the appellant served under a fixed term contract as held by the trial court and affirmed herein, the claim for compensation was not sustainable and was unmerited.
151. Finally, the appellant is entitled to a Certificate of Service for the duration served by dint of Section 51 of the *Employment Act*.
152. The upshot of the foregoing is that the appellant's appeal lacks merit and it is accordingly dismissed.
153. Parties to bear own costs of the appeal and suit before the trial court.

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

