

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. E315 OF 2024

ROBERT OGANDA MOCHORWA.....

APPELLANT

VERSUS

BOB MORGAN SERVICES LIMITED.....
RESPONDENT

(Being an appeal from the Judgment and decree of Hon. H.N.M Ng'ang'a (SPM) delivered on 29 February, 2024 CMEL NO.009 of 2021)

JUDGMENT

1. Through the Memorandum of Appeal filed on 13th December, 2024 the Appellant appeals against the judgment of Hon. H.N.M Ng'ang'a (SPM) delivered on 29 February, 2024 CMEL NO.009 of 2021. The Appeal was based on the grounds among others that:

- a) The learned magistrate erred in law and fact to find the termination was fair and lawful.**
- b) The learned magistrate erred in law and fact to find the appellant had committed a crime against the property of the respondent's client.**

c) The learned magistrate erred in law and fact to find the appellant had been paid terminal dues by the respondent.

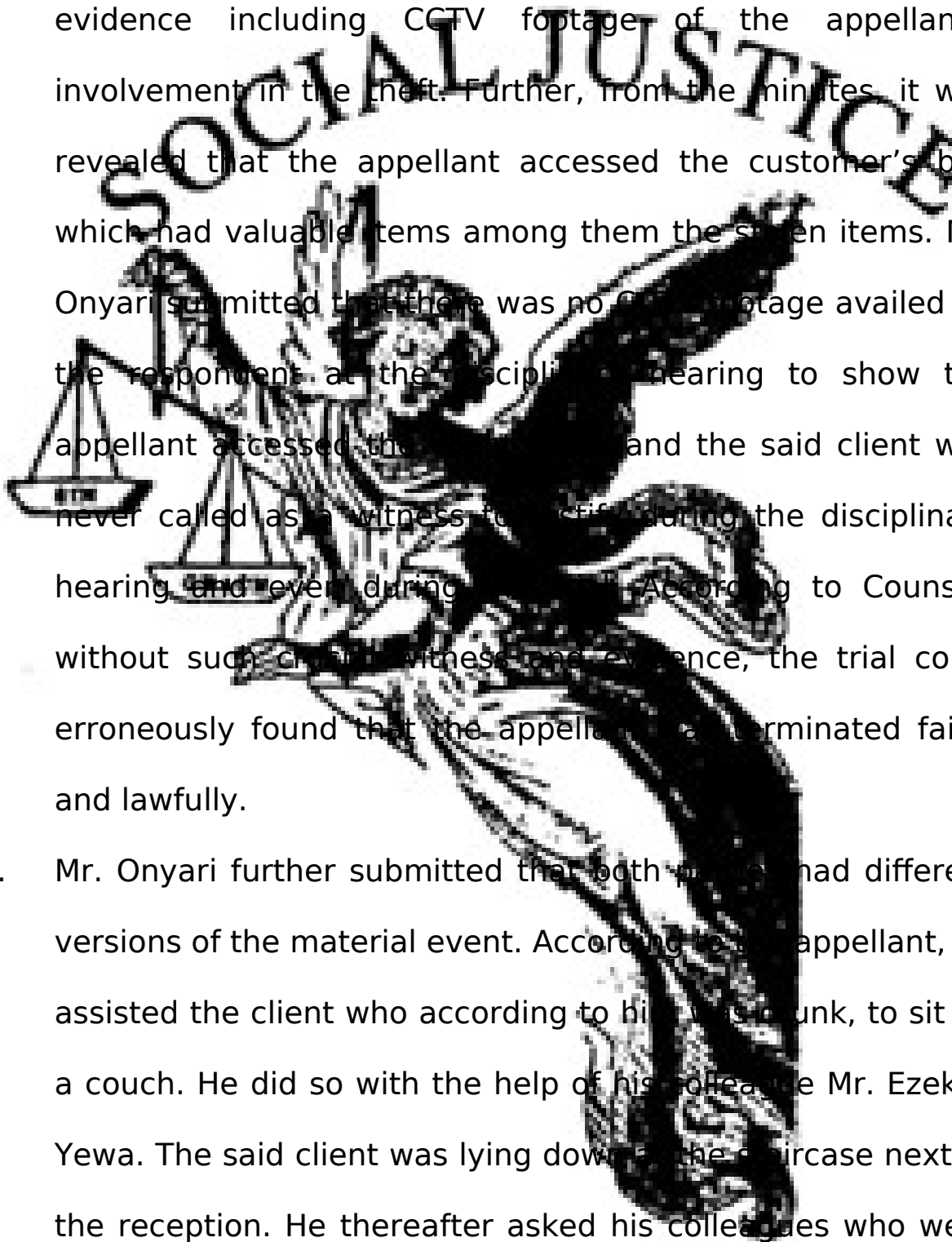
2. The Appellant therefore prayed that the appeal be allowed and the judgment delivered on 15th July, 2024 by the trial court be set aside, vacated and or substituted.

3. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

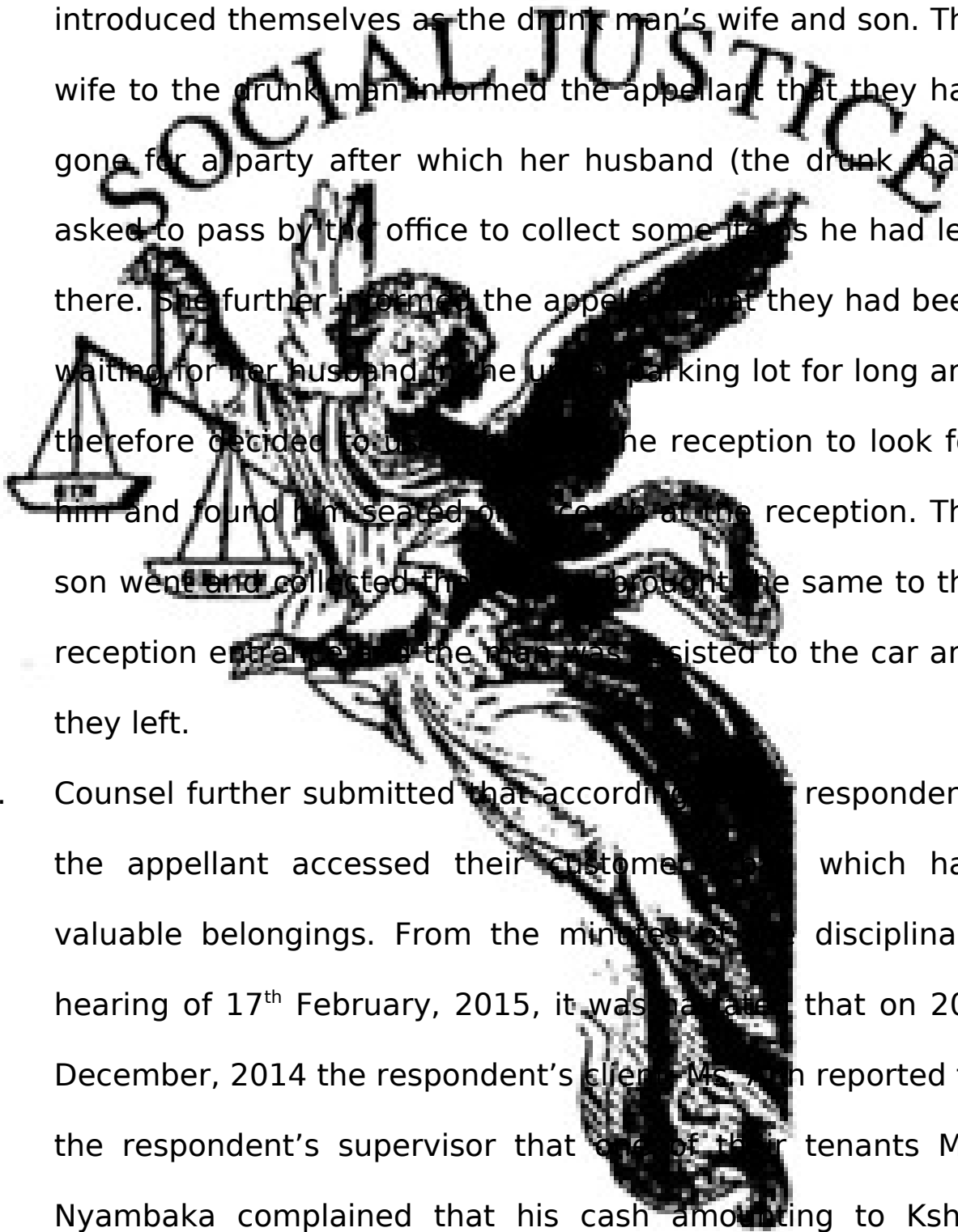
4. The Appellant's Advocate Nyari submitted among others that on 1st March 2024 the respondent's witness alleged that the appellant stole the respondent's client's camera and Kshs. 75,000/- and there was evidence availed but upon cross-examination if the Court's evidence was availed during the disciplinary hearing, he stated that the same was not availed as it had been erased. Counsel further stated that the witness had no proof that the appellant had Kshs. 75,000/- and a camera and further that there was no proof that the respondent refunded the client the alleged Kshs. 75,000/-.

5. According to Counsel, the trial court reached the conclusion that the appellant's termination was fair. In arriving at the



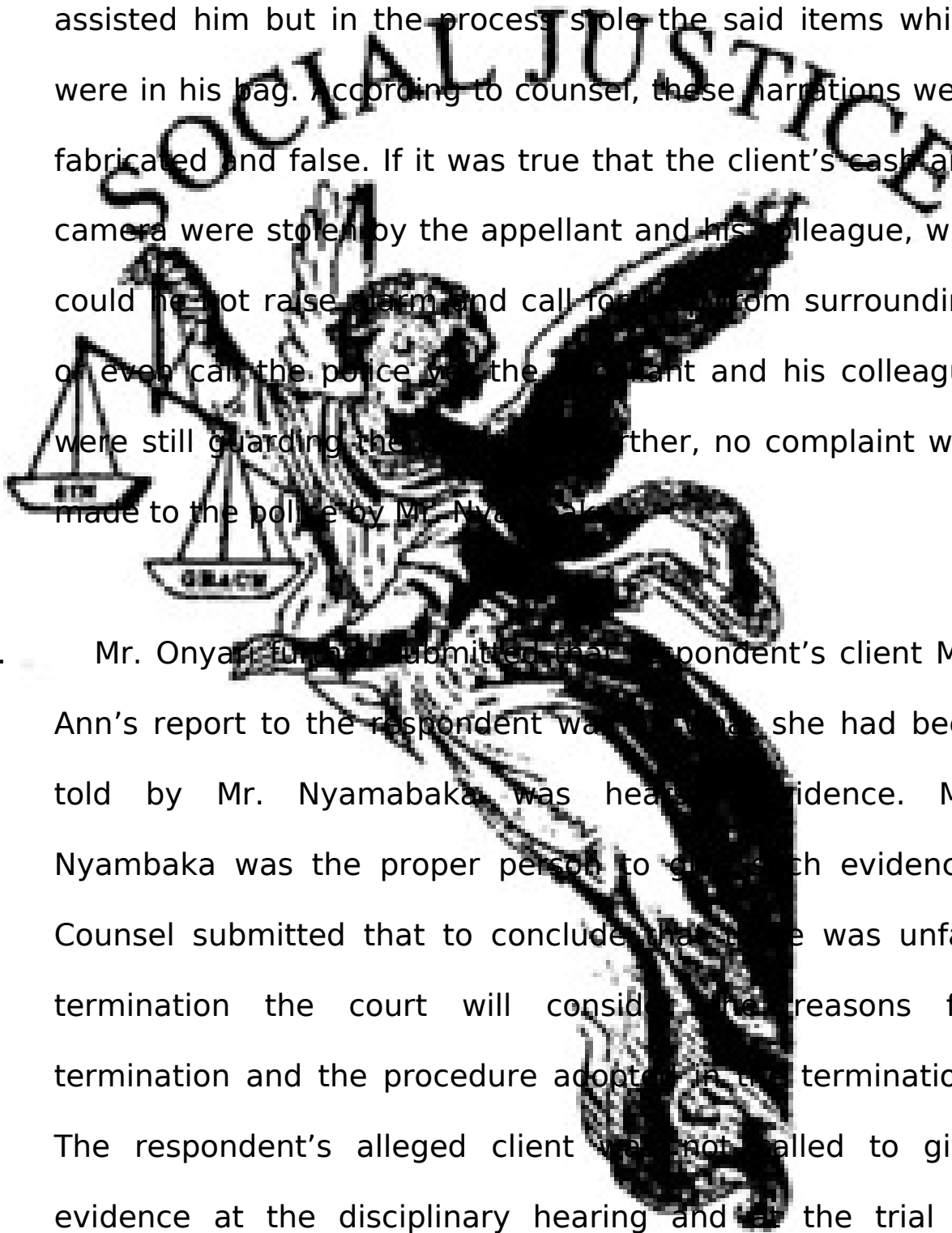
decision, the trial court reasoned that there was persuasive evidence including CCTV footage of the appellant's involvement in the theft. Further, from the minutes it was revealed that the appellant accessed the customer's bag which had valuable items among them the stolen items. Mr. Onyari submitted that there was no CCTV footage availed by the respondent at the disciplinary hearing to show the appellant accessed the bag and the said client was never called as a witness to testify during the disciplinary hearing, and even during appeal. According to Counsel, without such crucial witness and evidence, the trial court erroneously found that the appellant was terminated fairly and lawfully.

6. Mr. Onyari further submitted that both parties had different versions of the material event. According to the appellant, he assisted the client who according to him was drunk, to sit on a couch. He did so with the help of his colleague Mr. Ezekiel Yewa. The said client was lying down on the couch next to the reception. He thereafter asked his colleagues who were on patrol to go and check on the persons who were with the



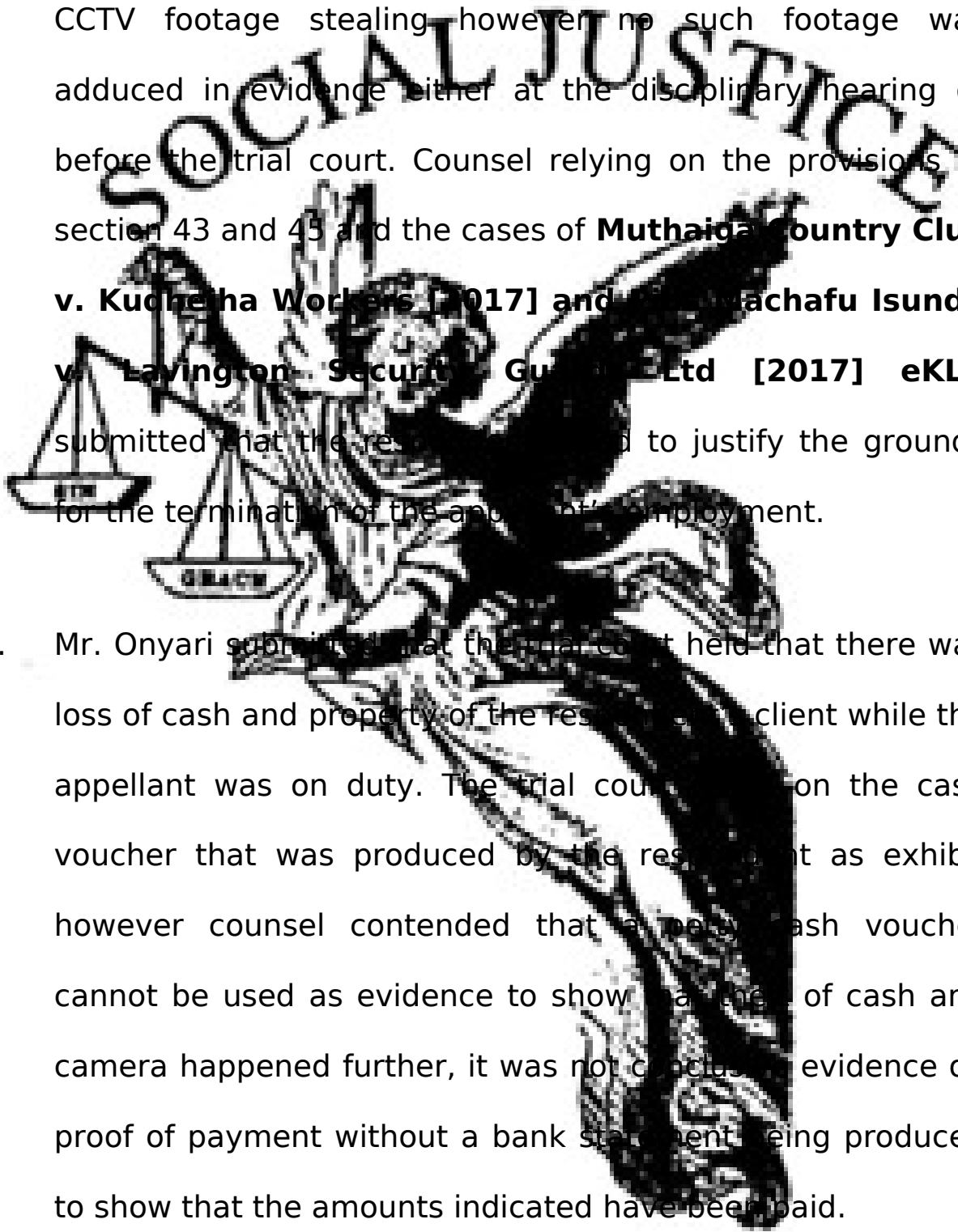
drunk man. The family of the drunk man came and introduced themselves as the drunk man's wife and son. The wife to the drunk man informed the appellant that they had gone for a party after which her husband (the drunk man) asked to pass by the office to collect some items he had left there. She further informed the appellant that they had been waiting for her husband in the office parking lot for long and therefore decided to go to the reception to look for him and found him seated on a bench at the reception. The son went and collected the items and brought the same to the reception entrance and the man was assisted to the car and they left.

7. Counsel further submitted that according to the respondent, the appellant accessed their customer's office which had valuable belongings. From the minutes of the disciplinary hearing of 17th February, 2015, it was narrated that on 20th December, 2014 the respondent's client Ms. Mwan reported to the respondent's supervisor that one of their tenants Mr. Nyambaka complained that his cash amounting to Kshs. 75,000/- and a digital camera had been stolen after he fell



down at the parking when the appellant and his colleague assisted him but in the process stole the said items which were in his bag. According to counsel, these narrations were fabricated and false. If it was true that the client's cash and camera were stolen by the appellant and his colleague, why could he not raise alarm and call for help from surrounding or even call the police yet the appellant and his colleague were still guarding the car. Further, no complaint was made to the police by Mr. Nyambaka.

8. Mr. Onyiah further submitted that respondent's client Ms. Ann's report to the respondent was that she had been told by Mr. Nyambaka was hearsay evidence. Mr. Nyambaka was the proper person to give such evidence. Counsel submitted that to conclude that there was unfair termination the court will consider the reasons for termination and the procedure adopted in the termination. The respondent's alleged client was not called to give evidence at the disciplinary hearing and at the trial to substantiate the claim of the loss of personal items. Further,



the respondent alleged that the appellant was captured on CCTV footage stealing however no such footage was adduced in evidence either at the disciplinary hearing or before the trial court. Counsel relying on the provisions of section 43 and 45 and the cases of **Muthaiga Country Club v. Kuchelha Workers [2017]** and **Wachafu Isundu v. Lavington Security Guards Ltd [2017]** eKLR submitted that the respondent failed to justify the grounds for the termination of the appellant's employment.

9. Mr. Onyari submitted that the trial court held that there was loss of cash and property of the respondent's client while the appellant was on duty. The trial court relied on the cash voucher that was produced by the respondent as exhibit however counsel contended that a mere cash voucher cannot be used as evidence to show that the loss of cash and camera happened further, it was not conclusive evidence on proof of payment without a bank statement being produced to show that the amounts indicated have been paid.

10. On the issue whether the appellant was paid his terminal dues, counsel submitted that the trial court erred in finding that this was paid. The respondent did not adduce any bank transfer or statement showing the appellant was paid terminal dues as calculated. The appellant told the trial court that he was employed by the respondent as a general worker but not issued with a letter of appointment or a payslip.

11. In conclusion Counsel submitted that the appellant is entitled to the prayers sought as he has abundantly demonstrated that his termination was unfair.

RESPONDENT'S SUBMISSIONS

12. Counsel for the respondent Mr. Njuguna on the other hand submitted among others that a review of the CCTV footage showed that the appellant and his colleagues accessed the respondent's client's bag and retrieved the items involved. Further, at the disciplinary hearing the appellant admitted that he accessed the complainant's bag and checked a phone which was incessantly ringing. It was the same bag that the complainant said he had Kshs. 75,000/- which was stolen.

According to counsel, the appeals committee was not able to review the CCTV footage as it had overwritten itself.

13. Concerning payment of terminal dues, counsel submitted that these including gratuity were processed through the appellant's bank account at CFC-Stanbic account number 010000047128738 and proof of the appellant's account details where the payment was made was produced. On whether the fairness of the termination was proved, Mr. Njuguna submitted that there was no basis for disturbing the trial court's finding that the termination was fair. While relying on the provisions of section 47 of the Act, counsel submitted that the standard of proof is on a balance of probability and the reason for termination in matters that the employer at the time of termination of the contract genuinely believed to exist. To this extent counsel relied on the case of *KRA v. Reuwel Waithaka Githinji & 2 others* [2019] eKLR. Counsel further relied on the case of **George Musumali v. G4S Security Kenya Ltd** [2016] eKLR where the court stated that internal disciplinary proceedings are not similar to court proceedings or criminal trial where

witnesses have to be called and confirm beyond reasonable doubt as to what happened. Accessing the complainant's bag without approval of the owner met the subjective test that the appellant was involved in theft of the lost items.

14. Regarding the fairness of the procedure followed, counsel submitted that the appellant advised attending the disciplinary hearing on 17 February 2015 accompanied by two union representatives. This was followed by the appeal process and the summary dismissal was reduced to a normal termination. There was sufficient evidence that the disciplinary procedures were employed and the appellant granted his rights.

15. Regarding the remedies sought, Mr. Njoroge submitted that the tabulation of the appellant's dues were produced which showed he was paid his terminal dues. These were processed and paid into the appellant's bank account. According to counsel, the trial Court rightly rejected the claim for compensation and was guided by the case of **Moses Mwaniki v Ibrahim Kinyanjui Gashobara t/a Theresa General Merchants [2020]eKLR.**

DETERMINATION.

16. This Court as first appellate Court is guided by the principles set out in several decided cases by it or the Court of Appeal. For instance the Court of Appeal for East Africa in the case of **Peters -vs- Sunday Post Limited [1958] EA 424** stated as follows:

“ the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

17. This appeal revolves around the question whether the trial court erred in finding that termination of the claimant was for justifiable and valid reasons and that it was done through a fair procedure and further that the appellant had been paid his final dues.

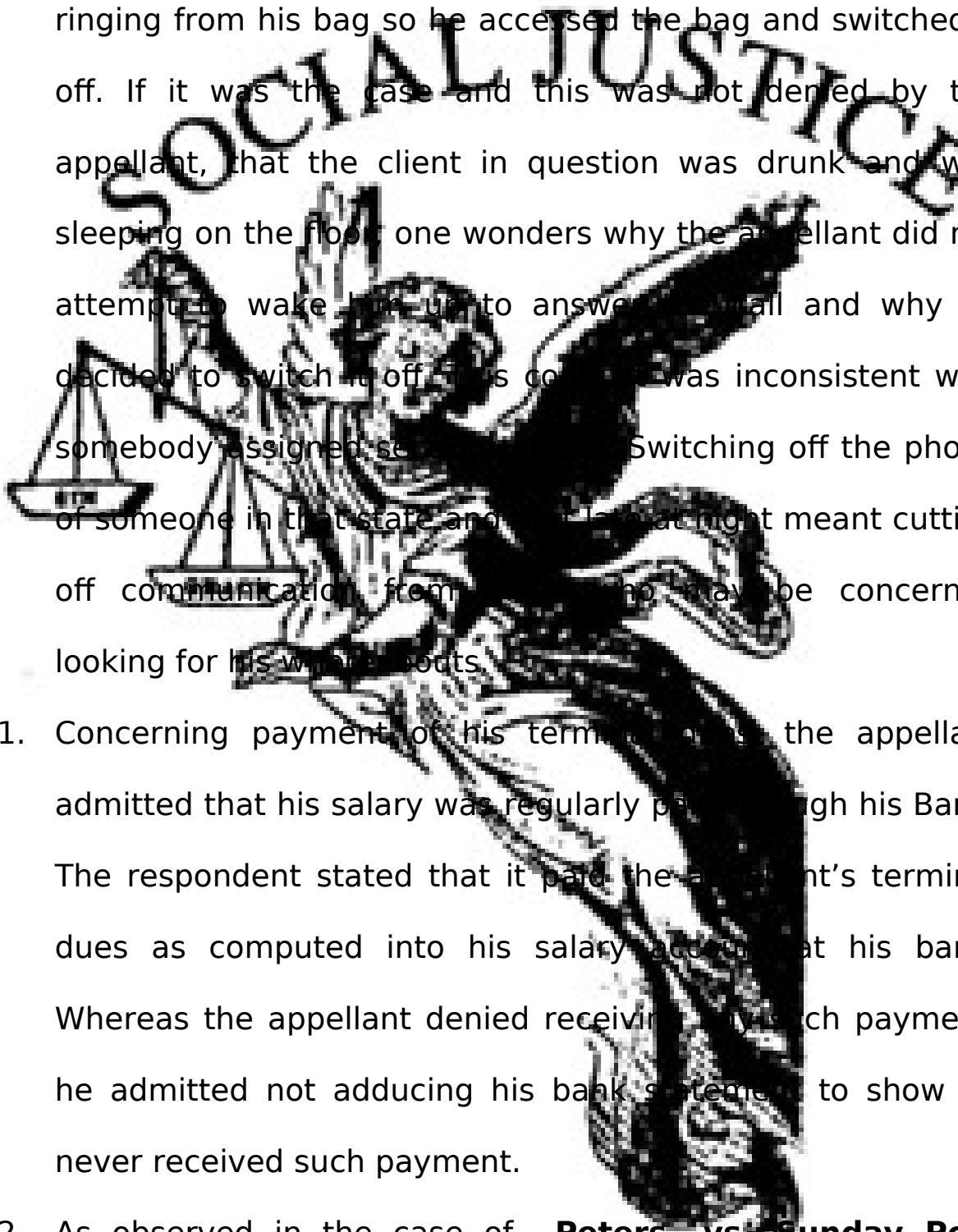
18. The trial court concluded that the reason for dismissal was proved in that there was overwhelming evidence demonstrating that the appellant was involved in the theft of

the respondent's client's property namely Kshs. 75,000/- and a camera. The trial court in reaching that conclusion observed that a CCTV footage was played at the disciplinary hearing showing the appellant removing the lost items from their customer's bag.

19. In the minutes of the disciplinary hearing on page 81 of the Record of Appeal, it is noted as follows:

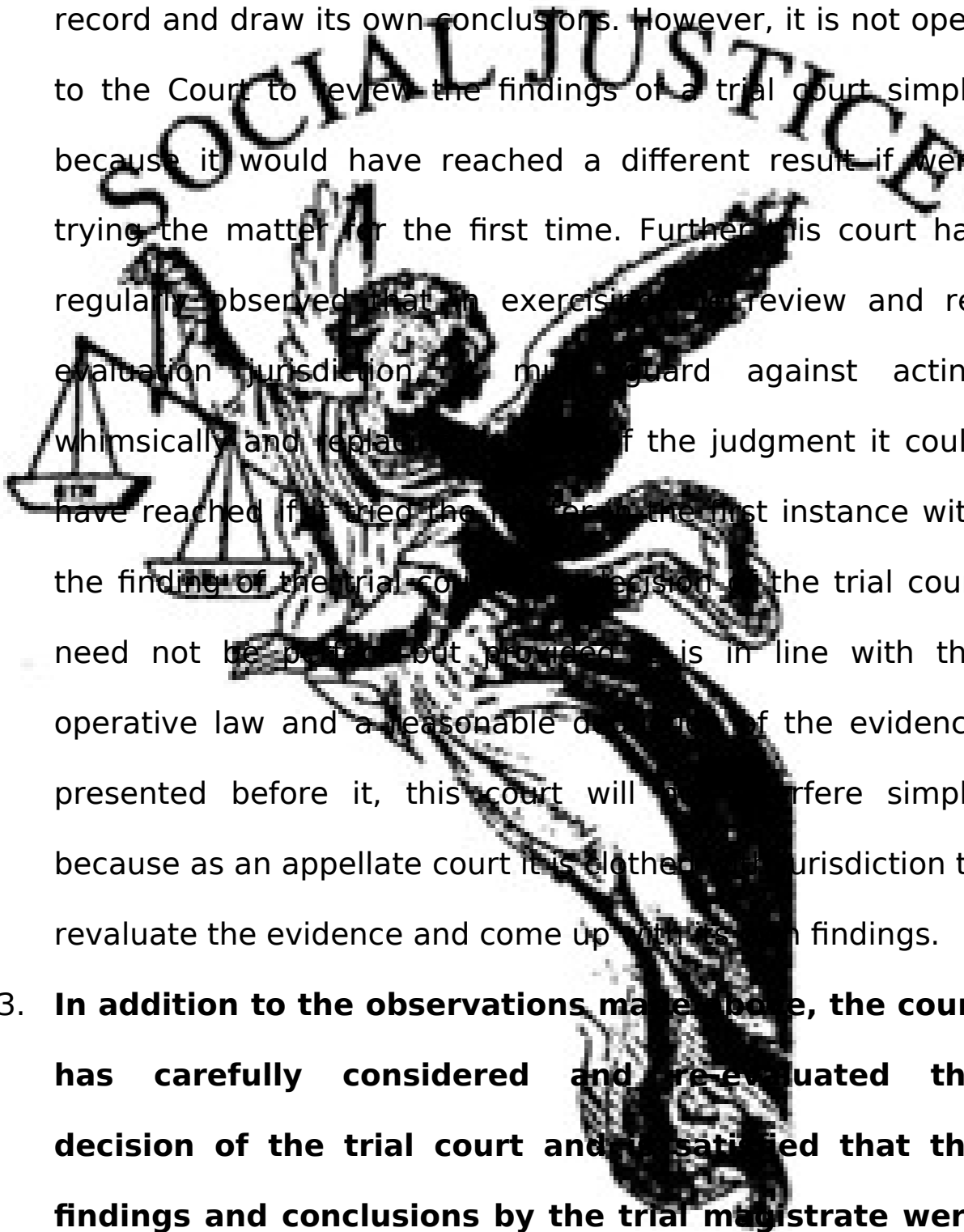
'...Robert stated that the customer's phone was ringing incessantly inside his bag. Therefore, he had to open and access the client's bag without seeking consent. He asserted that he only took the phone, put it off then returned it to the bag. He all this while the customer lay asleep on the ground. The panel sought to find out from Robert why he failed to wake the customer to attend to his ringing phone...The panel also asked him to explain what it is that he picked from the customer's bag which he never returned as captured on the CCTV footage".

20. Whereas the appellant had claimed that there was no CCTV footage during the disciplinary hearing, the appellant contended that the same was not replayed during the hearing of his appeal against the dismissal as the respondent stated that the system overwrites itself after some time and therefore the video was not available. If there was no CCTV footage at all, the one wonders what he required to be played at the appeal hearing. From the extract of the minutes above, the



appellant stated that the customer's phone was incessantly ringing from his bag so he accessed the bag and switched it off. If it was the case and this was not denied by the appellant, that the client in question was drunk and was sleeping on the floor one wonders why the appellant did not attempt to wake him up to answer the call and why he decided to switch it off. This conduct was inconsistent with somebody assigned security. Switching off the phone of someone in that state and on a late night meant cutting off communication from someone who may be concerned looking for his whereabouts.

21. Concerning payment of his terminal dues the appellant admitted that his salary was regularly paid through his Bank. The respondent stated that it paid the appellant's terminal dues as computed into his salary account at his bank. Whereas the appellant denied receiving any such payment, he admitted not adducing his bank statement to show he never received such payment.
22. As observed in the case of **Peters -vs- Sunday Post Limited [1958] EA 424**, this court as an appellate court is



under duty to reconsider and reevaluate the evidence on record and draw its own conclusions. However, it is not open to the Court to review the findings of a trial court simply because it would have reached a different result if were trying the matter for the first time. Further this court has regularly observed that in exercising its review and re-evaluation jurisdiction, it must guard against acting whimsically and replacing its own judgment if it could have reached the same result as the trial court with the findings of the trial court. A decision of the trial court need not be perfect but provided it is in line with the operative law and a reasonable deduction of the evidence presented before it, this court will not interfere simply because as an appellate court it is clothed with jurisdiction to reevaluate the evidence and come up with its own findings.

23. **In addition to the observations made above, the court has carefully considered and re-evaluated the decision of the trial court and is satisfied that the findings and conclusions by the trial magistrate were reasonable and a fair deduction from the evidence**

presented by the parties. The Court therefore finds no justification in interfering with the same.

24. The Appeal is therefore found without merit and is hereby dismissed with costs.

25. It is so ordered.

Dated at Nairobi, this 26th day of September, 2025

Delivered virtually this 26th day of September, 2025

Abuodha Nelson Jorum

Presiding Judge, Appeal Division