



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT KISII**  
**APPEAL NO. E002 OF 2024**

DONALD OENGA ONDIEKI.

.....**APPELLANT**

**VERSUS**

NYAMOSONGO COOPERATIVE SOCIETY LTD.....**RESPONDENT**

*(Being an appeal from the judgment of Hon. P. K. Mutai  
(SPM) delivered on 20<sup>th</sup> May 2024 in Kisii CMCELRC No. 1  
of 2019)*

**BETWEEN**

DONALD OENGA ONDIEKI.

.....**CLAIMANT**

**VERSUS**

NYAMOSONGO COOPERATIVE SOCIETY LTD.....**RESPONDENT**

**JUDGMENT**

1. In a judgment delivered on 20<sup>th</sup> May 2024, the Trial Magistrate dismissed the Appellant's suit with costs. The Court found that the Respondent lacked authority to institute disciplinary proceedings against the Appellant, having ceased to be his employer upon his transfer to Moromba Farmers Cooperative Society on 23<sup>rd</sup> August 2018. The Magistrate thus held that the Respondent had no capacity to dismiss the Appellant after the said transfer, concluding that the claim did not lie against the Respondent. Dissatisfied with that judgment the Appellant lodged the present appeal contending that the Trial Magistrate erred in both law and fact by:

- (a) Finding that he was not employed by the Respondent at the time of his summary dismissal.
- (b) Failing to consider his evidence demonstrating errors and confusion in his transfer to Moromba FCS Ltd.
- (c) Ignoring his long 29 years of service with the Respondent.
- (d) Condemning him to pay costs despite clear evidence of the Respondent's acts and omissions demonstrating bad faith.

2. In light of this, he urged the Court to allow the appeal, set aside the Trial Magistrate's judgment, and substitute it with a finding that his suit was meritorious. He also prayed for costs of both the appeal and the suit before the Magistrate's Court.
3. Pursuant to directions that the appeal be disposed of by way of written submissions, both parties filed their written submissions.

#### Appellant's Submissions

4. The Appellant identified the following issues for determination:
  - (i) Whether he was the Respondent's employee at the time of dismissal;
  - (ii) Whether the Court erred in disregarding his long and dedicated service of 29 years;
  - (iii) Whether he is entitled to unpaid salary arrears;
  - (iv) Whether the Trial Court erred in awarding costs to the Respondent; and
  - (v) Which party should bear costs.

5. On the first issue, the Appellant submitted that his employment with the Respondent was never disputed. He contended that throughout the proceedings before the Lower Court, the Respondent expressly admitted his employment status, and that at no time was the employment relationship lawfully terminated or his duties transferred. He referred to letters dated 23<sup>rd</sup> August 2018 and 21<sup>st</sup> September 2018, noting that the former purported to reroute his transfer from Nyosia FCS to Moromba FCS, while the latter evidenced his complaint of being prevented from reporting to Moromba FCS. He asserted that this proved the transfer was never effected. The Appellant further asserted that the transfer null and void as the Respondent did not consult him, in line with section 10(5) of the Employment Act which requires consultation before any change in terms of employment.

6. To reinforce this position, the Appellant emphasized that any transfer must be transparent and consensual. He relied on **Kenya Airways v Aviation & Allied Workers Union & 3 others [2014] eKLR**, where the court held that unilateral

transfers are unlawful. He averred that the Respondent's actions, including subjecting him to a disciplinary hearing and issuing a dismissal letter dated 19<sup>th</sup> November 2018, confirmed that he remained under the Respondent's employment and control. Accordingly, he faulted the Trial Court for failing to appreciate that he was still an employee of the Respondent at the time of the purported dismissal.

7. On the second issue, the Appellant submitted that the Trial Court erred in disregarding his long and unbroken service of twenty-nine years with the Respondent. He asserted that his lengthy tenure ought to have been given significant weight in assessing the fairness of his dismissal. He maintained that the Respondent's decision to summarily dismiss him without adherence to due process violated the principles of natural justice and fairness under the Employment Act. In support of this position, he cited **Catherine Nduta Ngugi v Kenya Commercial Bank Ltd [2016] eKLR**, where the court held that long service is an important factor in determining fairness in dismissal, and the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR**,

where the Court of Appeal underscored the necessity of procedural fairness, particularly for long-serving employees.

8. On the issue of unpaid salary arrears, the Appellant submitted that the Trial Court erred both in law and in fact by failing to consider the mediation report, which by concession of both parties awarded him Kshs. 942,859/- in salary arrears and Kshs. 257,141/- as general damages for unlawful termination, totalling Kshs. 1,200,000/-.

9. Regarding costs before the Lower Court, the Appellant submitted that the Trial Magistrate misdirected himself in condemning him to pay costs despite the Respondent's evident bad faith and procedural irregularities. He contended that the Respondent's conduct warranted censure rather than indemnification through an award of costs. He cited the case of **Julius Kamau Ngoya v Kenya Power & Lighting Co. Ltd [2016] eKLR**, where the court held that the improper conduct of a party may justify denial of costs.

10. On the issue of costs of the appeal, the Appellant maintained that they should be borne by the Respondent,

having approached the Court with unclean hands. He averred that since the Respondent's actions precipitated the dispute, it would be inequitable to saddle him, as the aggrieved party, with the burden of costs. He emphasized that although section 27 of the Civil Procedure Act grants the court discretion in awarding costs, such discretion must be exercised judiciously and in accordance with the principle that "costs follow the event." In conclusion, the Appellant urged the Court to find that the Trial Court erred both in law and in fact in its assessment of the evidence and application of the relevant legal principles. He therefore prayed that the appeal be allowed.

#### Respondent's Submissions

11. The Respondent submitted that the Appellant ceased being its Secretary Manager on 31<sup>st</sup> July 2018. It referred to a letter dated 23<sup>rd</sup> August 2018, which reversed his transfer from Nyosia FCS to Moromba FCS. The Respondent asserted that, in the absence of any official communication redeploying him to the Respondent, the Appellant could not claim to have remained its employee. It explained that the Respondent was under the umbrella of the Gusii Farmers Co-

operative Union, which had effected the transfer, and therefore it maintained that it was the Union not the Respondent that had employed the Appellant.

12. In light of the foregoing, the Respondent urged the Court to uphold the Trial Court's finding that it lacked authority to dismiss the Appellant. Consequently, it argued that the Appellant's long service period was immaterial, as it had acted *ultra vires* in effecting his dismissal. On the issue of unpaid salary, the Respondent contended that the Appellant, being in charge of payroll, was responsible for processing salaries and had failed to produce the master roll to substantiate his claim of non-payment. As for the mediation proceedings referred to by the Appellant, the Respondent maintained that they collapsed without any agreement being reached. In conclusion, the Respondent urged the Court to dismiss the appeal with costs.

#### Disposition

13. This being a first appeal, this Court is enjoined to evaluate and examine the record before the Magistrates' Court and the evidence presented before it in order to arrive at its own

conclusion. This principle of law was settled in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** in that case the Court of Appeal outlined the duties of a first appellate court as follows:

*"I accept counsel for the respondent's proposition that 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 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 it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."*

[Emphasis supplied]

14. Having properly warned myself that I neither saw nor heard the Appellant and the Respondent testify, I come to the following determination having evaluated the evidence

they presented in the Trial Court and which evidence and documents in support thereof are before this Court.

15. The Appellant asserts unfair and unlawful dismissal. Therefore, the issues for determination on the appeal before me are (i) whether the Appellant was an employee of the Respondent and (ii) whether the Respondent unlawfully/unfairly terminated his employ. Corollary to this is who bears the costs.

16. The question as to whether the Appellant was the Respondent's employee at the time of dismissal is a question of fact. The Respondent had sent the Appellant on a transfer to Moromba Farmers' Cooperative Society on 23<sup>rd</sup> August 2018. Despite this, the Respondent is the one which terminated the services of the Appellant. It was therefore clear the Respondent the employer of the Appellant as at the time of dismissal and ought to have given him a hearing prior to dismissal as the reasons advanced fall within the purview of section 41 of the Employment Act. He ought not have been dismissed without reason. The Appellant is thus right to assert there was unlawfulness in his dismissal. He

earned Kshs. 24,592/- a month as at the material time relative to this suit. For the unlawful dismissal he would be entitled to 2 months salary as compensation noting he was not a model employee and generated a lot of tension and friction at each cooperative society he worked at. He was even removed as a member in one instance. Having been a major contributor to the dismissal meted out he only gets the sums indicated.

17. The Appellant had asserted that the transfer was null and void as the Respondent did not consult him, in line with section 10(5) of the Employment Act. The Appellant is wrong on this score. No employer is required to consult an employee before undertaking a managerial prerogative such as a transfer. If employers were required to consult employees in terms of section 10(5) of the Employment Act which the Appellant has misread, there would be no staff changes nor would there be any disciplinary aspect since by parity of reasoning any action which would impact the employment status of the employee would be up for deliberation and consultation at all times. This cannot be the intention of legislation on matters employment.

18. The foregoing is sufficient to show the Appellant is partly successful in the appeal and that in granting him a minor award in the court below, I would be constrained to only grant him the compensation equivalent to 2 months salary which is Kshs. 49,184/-. For the matter in the Magistrate's Court, the Appellant who was the Claimant there, will not have any costs awarded to him or against him. There is also no order as to costs on this appeal the Appellant having declined to pay court fees for the submissions filed on 5<sup>th</sup> August 2025 at 10.41am.

Orders accordingly.

**Dated and delivered at Kisumu this 11<sup>th</sup> day of**

**November 2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**