



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT KISUMU**  
**APPEAL NO. E056 OF 2024**

DANIEL OJWANG NYAWARA.....**APPELLANT**

**VERSUS**

STRATEGIC                      OUTCOME                      CONSULTANTS  
LTD.....**RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. Douglas Ogoti (CM) in Kisumu CMELRC No. E165 of 2021 delivered on 30<sup>th</sup> September 2024)***

1. This appeal arises from the Judgment of Hon. Douglas Ogoti (CM) delivered on 30<sup>th</sup> September 2024 in **Kisumu CMELRC No. E165 of 2024, Daniel Ojwang Nyawara v Strategic Outcome Consultants Ltd.** Being aggrieved by that decision, the Appellant lodged a Memorandum of Appeal with

this Court dated 14<sup>th</sup> October 2024 setting out the following grounds:

- (a) *That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellant was employed by the Respondent which had issued him with a letter of Appointment to that effect.*
- (b) *That the Learned Trial Magistrate erred in law and in fact in disregarding the evidence of the Appellant thereby arriving at an erroneous decision.*
- (c) *That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant had been employed by the Respondent and that his employment had been unlawfully terminated.*
- (d) *That the Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's evidence without due consideration and contrary to the weight of the available evidence, thereby arriving at an erroneous decision.*
- (e) *That the Learned Trial Magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant and inter-alia the letter of*

*Appointment between the parties as well as the Salary Vouchers issued to the Appellant by the Respondent and thereby arrived at an erroneous judgment.*

*(f) That the Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's claim without considering the evidence adduced by the Appellant in the absence of controverting evidence by the Respondent and by failing to appreciate previous decisions in similar matters as well as the relevant provisions of the law regarding employment.*

*(g) That the Learned Trial Magistrate erred in law and in fact by failing to consider the Appellant's Claim and evidence adduced in regard thereto thereby arriving at an erroneous decision.*

*(h) That the Learned Trial Magistrate erred in law and in fact by failing to consider and take into account that the documents relied upon by the Appellant were issued by the Respondent and emanated from the Respondent thereby arriving at an erroneous decision.*

*(i) That the Learned Trial Magistrate erred in law and in fact in disregarding the evidence of the Appellant and relying on and considering extraneous matters thereby arriving at an erroneous and unjust decision.*

2. On the basis of the foregoing grounds, the Appellant urged this Court to set aside the Trial Court's judgment and to allow the claim before the Trial Court. In the alternative, the Appellant prayed that the appeal be allowed and the Trial Court's judgment be set aside, varied, or vacated and substituted with such orders as this court may deem fit in the circumstances. The Appellant also sought the costs of the appeal as well as the costs of the proceedings before the Trial Court.

3. The appeal was canvassed by way of written submissions.

#### Appellant's Submissions

4. The Appellant submitted that the Court erred in finding he was not an employee despite the production of an appointment letter dated 26<sup>th</sup> October 2014 and salary

vouchers. He asserted that the Trial Magistrate improperly relied on extraneous considerations, such as whether the vacancy had been advertised or whether he had been interviewed, in reaching his decision. The Appellant maintained that no evidence had been adduced to prove that the documents he produced were forged, therefore the Trial Magistrate erred in shifting the burden of proof to him. In support of this position, the Appellant relied on section 9 of the Employment Act, which obligates an employer to reduce into writing a contract of employment where the engagement exceeds three months. He also relied on section 10(7) of the Act, which places the burden of proving or disproving the alleged terms of employment on the employer where the employer fails to produce a written contract.

5. With regard to the termination of his employment, the Appellant submitted that the same was unfair. He asserted that no reason was given for the termination and that he was not accorded a hearing, contrary to the principles of natural justice, particularly the rule that no person should be condemned unheard. The Appellant relied on section 45(1)

and (2) of the Employment Act, which prohibits unfair termination and requires the employer to prove that the reason for termination is valid and fair and that the termination was effected in accordance with fair procedure. He further relied on section 45(4)(b) of the Act, which provides that termination is unfair where the employer fails to act in accordance with justice and equity, as well as section 47(5), which places the burden of justifying the grounds of termination on the employer. Further supporting its position, the Appellant relied on the case of **David Gichana Omuya v Mombasa Maize Millers Ltd [2014] eKLR**, where the court held that section 41 of the Employment Act obligates an employer to notify an employee of the reasons for contemplated termination in a language the employee understands and to hear any representations made by the employee before making a decision. The Appellant also relied on **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, where the court held that a valid termination must satisfy both substantive justification and procedural fairness. Additionally, reliance was placed on **Alphonse Machanga**

**Mwachanya v Operation 680 Limited [2013] eKLR**, where the court summarized the procedural requirements under section 41 of the Employment Act, including the obligation to explain the reasons for termination to the employee, allow the presence of a fellow employee or union representative, and consider any explanation offered by the employee.

6. As to whether the Trial Court's decision should be disturbed, the Appellant urged the Court to do so, asserting that the Trial Magistrate ignored relevant evidence, relied on extraneous considerations, and failed to properly apply the law. He relied on **Mbogo v Shah [1968] EA 93**, in which it was held:

*"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so*

*arrived at a wrong conclusion. It would be wrong for this Court to interfere with the exercise of the trial Judge's discretion merely because this Court's decision would have been different."*

7. The Appellant therefore prayed that the appeal be allowed.

#### Respondent's Submissions

8. The Respondent urged the Court to be guided by the case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, given that it did not have the benefit of hearing the witnesses first hand. It maintained that the Appellant's evidence was false and unsubstantiated and could not be relied upon. With regard to the Appellant's alleged terms of employment, the Respondent submitted that the evidence on record did not support the existence of an employment relationship, even on a casual basis. It asserted that the Appellant merely carried out piece work and was paid a stipend. In support of this position, the Respondent pointed out that there was no evidence that the position had been advertised or that the Appellant had been interviewed.

Additionally, it maintained that it did not issue the alleged letter of appointment.

9. On whether the Appellant was unlawfully terminated from employment, the Respondent submitted that no terminable employment relationship existed in the first place. It further pointed out that the Appellant was usually paid by the hirer of the Respondent's machines and not by the Respondent itself. Moreover, the Respondent contended that the salary vouchers produced by the Appellant had not been proven. Regarding the Appellant's entitlement to the reliefs sought, the Respondent submitted that the Appellant had failed to prove that he was engaged by the Respondent. It further asserted that there was no proof of benefits ordinarily associated with employment, such as salary, overtime pay, leave, holidays, or off days. In view of the foregoing, the Respondent maintained that the Trial Court's judgment remained sound and unshaken, relying on **Mbogo v Shah (1968) EA 93**. Accordingly, it urged the court to dismiss the appeal with costs.

## Disposition

10. This being a first appeal, I am obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before that Court in order to arrive at my own conclusion. This principle of law was enunciated in the celebrated case of **Selle v Associated Motor Boat Co. Ltd [1968] EA 123** where 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]

11. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have

duly evaluated the evidence the parties presented in the Trial Court, and which evidence and documents in support thereof, are before this Court and I have come to the following determination.

12. The issues for this Court must determine are:
  - a. Whether the Respondent was unfairly terminated from employment;
  - b. Whether the Respondent was entitled to the orders granted; and
  - c. What orders should issue in respect of this Appeal.
  
13. The Appellant is stated to have been dismissed by the Respondent. The Appellant therefore had the burden of demonstrating there was first, a contract – whether oral or written and secondly, that the Respondent terminated the said contract unlawfully or unfairly. The Appellant forged a document to show employment. This deviousness is what cost him his case as the Learned Magistrate found on the basis of the impugned ‘contract’ there was no subsisting employment. The finding of the Learned Magistrate is not

improper as the Learned Magistrate heard Mr. George Ongidi who was the alleged employer. Mr. Ongidi as the record before me shows, disowned the document. The demeanour of this particular witness on the point must have played a major part. Because the Learned Magistrate believed the witness it is telling - the witness was believable and his denial of knowledge of the purported contract was thus upheld. I have reviewed the letter and I too agree there are very material inconsistencies such as the font, the top of the document appearing different and the final nail in the coffin is the imposition of a rubber stamp said to have been disused since 2009 and an address that was not for the company. All these showed the unreliability of the alleged letter of employment hence the diminutive probative value. In fact, it made the Appellant's case extremely weak.

14. Given there was no employment in the circumstances, could an unlawful termination occur? This is the precise dilemma the Learned Magistrate dealt with and he came to the correct conclusion. There was no contract and therefore by parity of reasoning there could be no dismissal. the fact

the position the Appellant was asserting he held was being advertised suggests rather strongly that there was no nexus between the Appellant and the Respondent to warrant the Learned Magistrate arriving at a different conclusion as opposed to that which he made in his decision.

15. In the final analysis, the Court upholds the findings of the Learned Magistrate as he neither misdirected himself on the facts or the law. He arrived at the correct conclusions on all points in dispute and therefore his decision cannot be overturned. Accordingly, the Appeal is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Kisumu this 10<sup>th</sup> day of March**

**2026**

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