

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
APPEALS DIVISION

APPEAL NO. E047 OF 2025

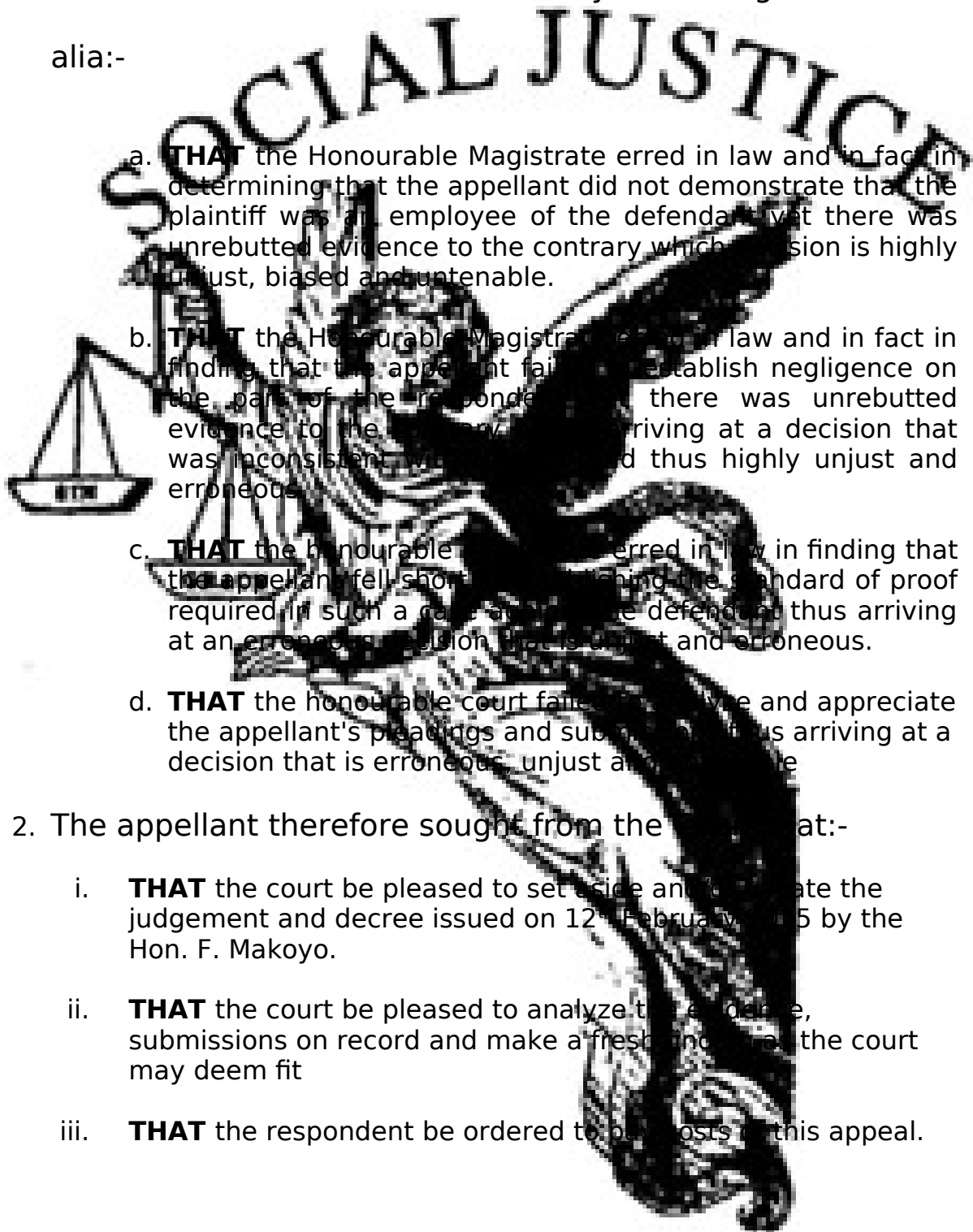
**(BEING AN APPEAL FROM THE JUDGMENT OF HON. F. OMWERI
DELIVERED ON THE 12TH OF FEBRUARY 2025 IN MILIMANI CMCC
5496 OF 2018)**

BETWEEN
WILFRED AJEGA..... APPELLANT
VERSUS
CHINA JIANGSU INTERNATIONAL CO. LTD..... RESPONDENT

JUDGMENT

1. By a memorandum of appeal dated 20th day of February 2025 the Appellant appealed against the judgment and decision of Hon. F. Omweri in CMCC No. 5496 of 2018 at

Nairobi delivered on 12th of February 2025 on grounds inter alia:-



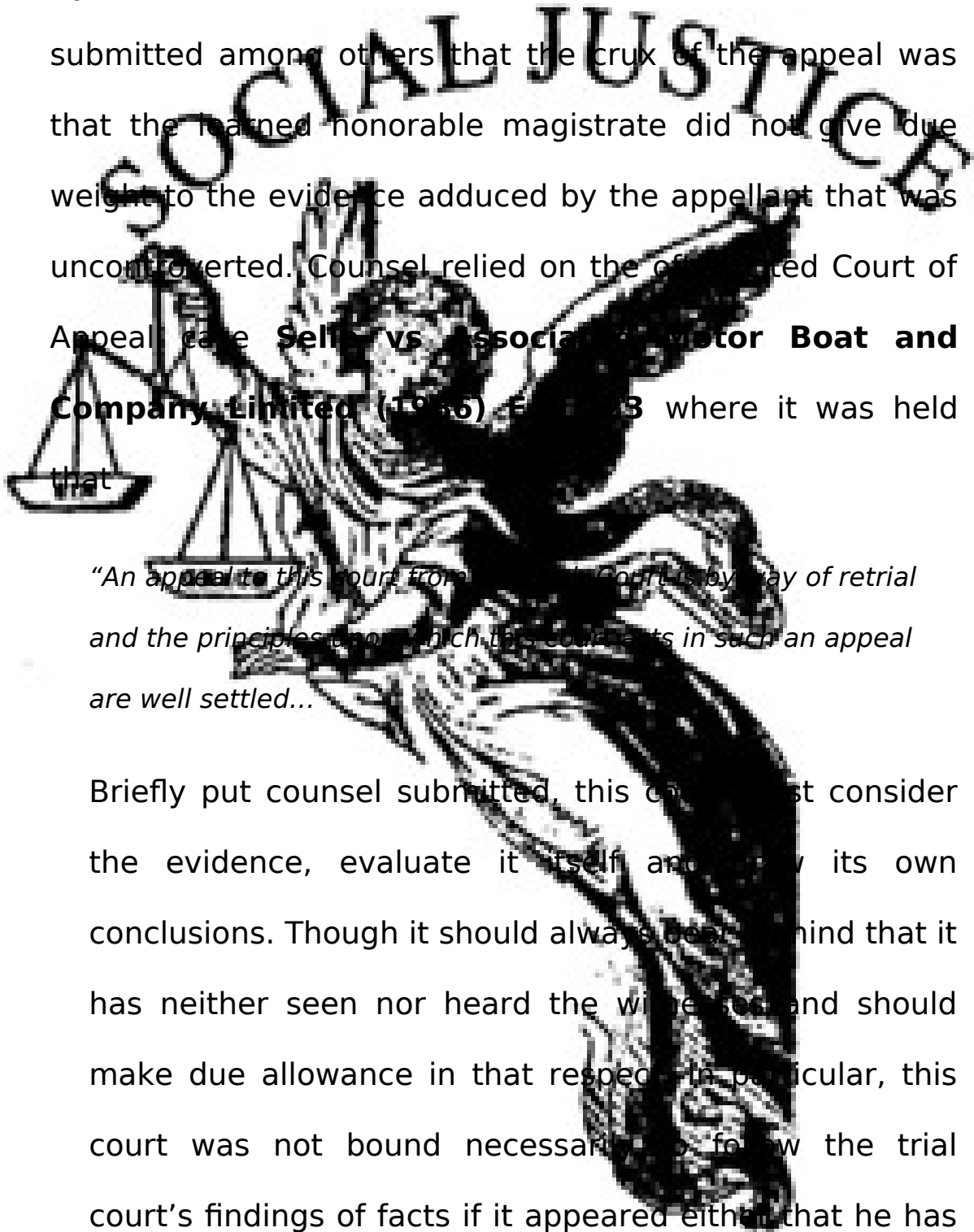
- a. **THAT** the Honourable Magistrate erred in law and in fact in determining that the appellant did not demonstrate that the plaintiff was an employee of the defendant yet there was unrebutted evidence to the contrary which conclusion is highly unjust, biased and untenable.
- b. **THAT** the Honourable Magistrate erred in law and in fact in finding that the appellant failed to establish negligence on the part of the respondent yet there was unrebutted evidence to the contrary which arriving at a decision that was inconsistent with the evidence and thus highly unjust and erroneous.
- c. **THAT** the Honourable Magistrate erred in law in finding that the appellant fell short of establishing the standard of proof required in such a case and that the defendant thus arriving at an erroneous decision that is unjust and erroneous.
- d. **THAT** the Honourable Magistrate failed to analyze and appreciate the appellant's pleadings and submissions thus arriving at a decision that is erroneous, unjust and untenable.

2. The appellant therefore sought from the court that:-

- i. **THAT** the court be pleased to set aside and annul the judgement and decree issued on 12th February 2025 by the Hon. F. Makoyo.
- ii. **THAT** the court be pleased to analyze the evidence, submissions on record and make a fresh finding that the court may deem fit
- iii. **THAT** the respondent be ordered to pay costs of this appeal.

3. The appeal was disposed of by written submissions and Mr.

Nyantika in his submissions dated 22nd October, 2025 submitted among others that the crux of the appeal was that the learned honorable magistrate did not give due weight to the evidence adduced by the appellant that was uncontroverted. Counsel relied on the oft-cited Court of Appeal case **Selle vs Association of Motor Boat and Company Limited (1966) E047/3** where it was held that



“An appeal to this court from a trial Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled...”

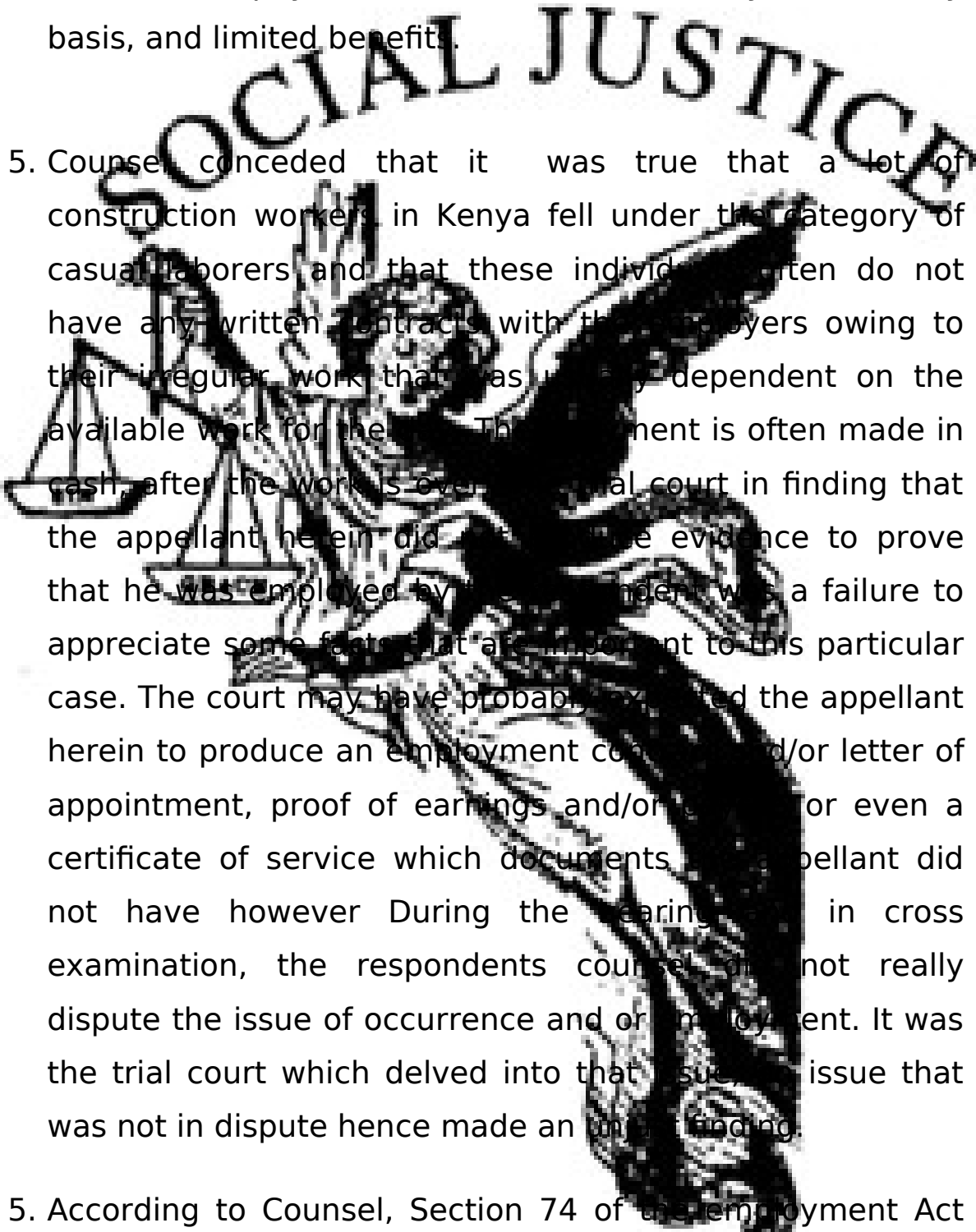
Briefly put counsel submitted, this court must consider the evidence, evaluate it itself and draw its own conclusions. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court was not bound necessarily to follow the trial court’s findings of facts if it appeared either that he has clearly failed on some points to take into account of

particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness was inconsistent with the evidence in the case in general. In this regard, Counsel identified two issues to be determined on the appeal, namely,

- a. *Whether the appellant's case met the required standards.*
- b. *Whether the appellant is entitled to the damages sought.*

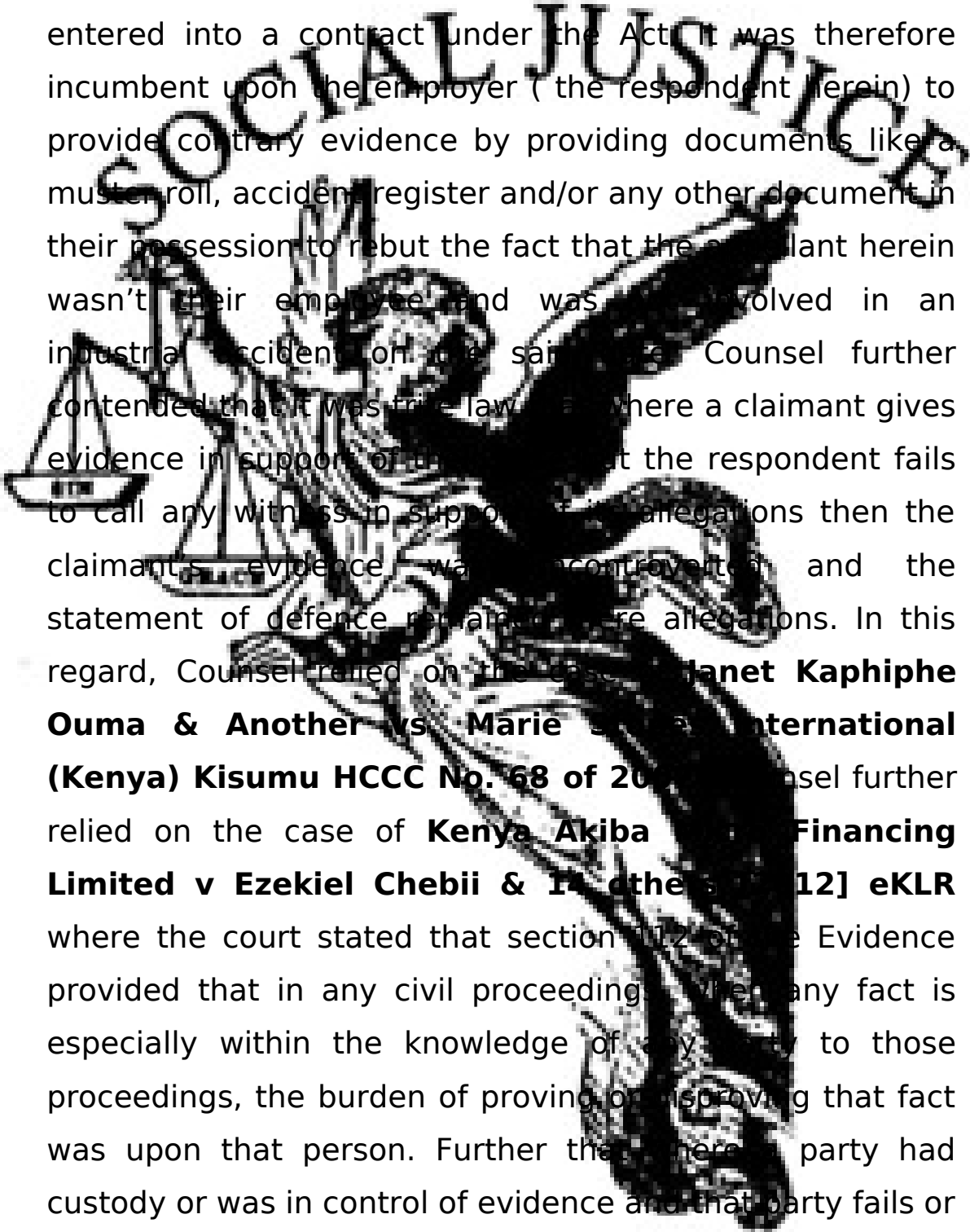
4. According to Counsel, the construction arising from the case before the trial court related to workman's compensation under WBA. There were also allegations of negligence on the part of the respondents, as alleged against them as were contained in the plaintiff's pleading. According to the witness statement that the appellant admitted at the trial, he stated that he was a casual laborer at a construction site and a casual laborer according to Counsel, was defined as a person whose terms of engagement provided for payment at the end of each day and who was not engaged for a longer period than twenty-four hours at a time. This type of employment was often characterized by short term or irregular work arrangements, uncertain payment terms

which often, payment was made on a weekly and/or daily basis, and limited benefits.



5. Counsel conceded that it was true that a lot of construction workers in Kenya fell under the category of casual laborers and that these individuals often do not have any written contracts with their employers owing to their irregular work that was usually dependent on the available work for the day. The payment is often made in cash after the work is over. The trial court in finding that the appellant herein did not have the evidence to prove that he was employed by the respondents was a failure to appreciate some facts that are important to this particular case. The court may have probably expected the appellant herein to produce an employment contract and/or letter of appointment, proof of earnings and/or bank statement or even a certificate of service which documents the appellant did not have however During the hearing and in cross examination, the respondents counsel did not really dispute the issue of occurrence and original employment. It was the trial court which delved into that issue as an issue that was not in dispute hence made an incorrect finding.

5. According to Counsel, Section 74 of the employment Act provided that “An employer shall keep a written record of



all employees employed by him, with whom he has entered into a contract under the Act. It was therefore incumbent upon the employer (the respondent herein) to provide contrary evidence by providing documents like a muster roll, accident register and/or any other document in their possession to rebut the fact that the appellant herein wasn't their employee and was not involved in an industrial accident on the same date. Counsel further contended that it was free law where a claimant gives evidence in support of a fact but the respondent fails to call any witness in support of his allegations then the claimant's evidence was uncontested and the statement of defence remained mere allegations. In this regard, Counsel relied on the case of **Janet Kaphiphe Ouma & Another vs Marie Sava International (Kenya) Kisumu HCCC No. 68 of 2019**. Counsel further relied on the case of **Kenya Akiba Bank Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR** where the court stated that section 112 of the Evidence provided that in any civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact was upon that person. Further that where a party had custody or was in control of evidence and that party fails or refuses to tender or produce, the court was entitled to

make an adverse inference that if such evidence was produced, it would be adverse to such a party. Employee records and other documents in this case were in the possession of the respondent who never produced them. Negative inference must therefore be drawn onto them, therefore the trial court erred in finding that the appellant didn't establish on a balance of probabilities that he was an employee of the respondent.

6/ Concerning negligence, the respondent admitted that it was the appellant's testimony which was not controverted by the respondent, that as he was working, an item fell from a height and hit his arm, causing him injuries. The appellant stated that he was not working with any protective gear, the respondent did not provide a safe working condition, and that the respondent failed to carry out adequate supervision of the appellant's work to ensure his safety. Counsel submitted and the trial Court that safety in work places involves all employees, whether permanent or casual and that under the WIBA Act, employees are supposed to be provided with safe working conditions and protective equipment to safeguard them from sustaining injuries and that it was within the reasonable contemplation of the respondent who is engaged in construction of highrise buildings to foresee a

likelihood of having falling objects and items to employees and individuals below them. This required adequate supervision of the workplace to ensure that the workers therein are not exposed to the dangers emanating therefrom.

7. The respondent did not rebut the fact that there was negligence on their part that occasioned the injuries to the appellant. Apart from mere denial in the statement of defence, without a witness who would have given a different account on behalf of the appellant may have contributed to the causation of the accident and the injuries sustained, then the principle in *Janet Kaphiphe Ouma* case applied.
8. Concerning the issue of whether the appellant was entitled to the damages sought, evidence submitted that the appellant prayed for general and special damages in respect to the injuries sustained. The trial court indicated that it could have awarded a sum of Kshs. 1,000,000/- had the appellant herein proved his case against the respondent. What the court failed to consider was a prayer for special damages that was supported with evidence and that should also be awarded.
9. In conclusion counsel prayed that the appeal be allowed with costs.
10. Counsel for the Respondent, Mr. Maina on his part too

relied on the principles guiding this Court as the first appellate Court as was stated in the case of **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123**. Counsel further submitted on the question of who bears the evidentiary burden in civil proceedings and stated that it was well settled in law. According to Counsel, section 107 of the Evidence Act, Chapter 80 of the Laws of Kenya states that:-

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- (1) whoever desires a court to give judgement as to any legal right or liability which depends 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”.**

Section 108 of the Evidence Act offers further clarity on which party bears the evidentiary burden in proceedings as follows:-

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

From these provisions of the Evidence Act, counsel submitted that the burden of proof squarely lay on the appellant. First and foremost, the Appellant had the duty to prove that he was an employee of the Respondent. Secondly, he had to prove that he was involved in an accident and in the manner alleged. Thirdly, that the accident occurred as a result of negligence of the Respondent. Fourthly, he must prove that

he suffered injury as a result of the Respondent's negligence and lastly, he must justify his claim for Special Damages.

11. Counsel invited that Court to consider page 9, line 20 of the Record of Appeal where the Appellant alleged in Paragraph 3 of the Pleadings that at the time of the accident, he was an employee of the Respondent. According to Counsel, this assertion was denied by the Respondent in Paragraph 3 of the Statement of Defence. This was at page 24 of the Record of Appeal. The Appellant did not tender any evidence whatsoever to demonstrate that he was an employee of the Respondent. We humbly request your Lordship to find that the Appellant failed to demonstrate that he was an employee of the Respondent.

12. Regarding the allegation of injuries sustained, Counsel invited the Court to look at the Appellant's witness statement at page 13 of the Record of Appeal where the Appellant testified that a metal bar fell from above and hit his hand. He did not state who or what pushed the bar. There is no indication of how the bar fell. We humbly submit that the Respondent's Supervisors and/or Managers cannot be present on sites round the clock to watch over employees as they carry out their duties. Counsel submitted that the Courts have long held that it would be unreasonable to expect employers to completely watch

over their employees and relied on the High Court's decision in **Devki Steel Mills Limited -vs- Joseph Mulwa** where the court stated as follows at page 3, paragraph 2:-

"...The employer is expected to take all reasonable steps to ensure the employee's safety. He is not expected to watch over the employee constantly."

13. According to Counsel, all the Appellant alleged was that the Respondent was negligent, yet, finding negligence, the Appellant must show that the Respondent owed him a duty of reasonable care and that he breached that duty as was held in the case of Nairobi **NCCA No. 152 of 2003; Statpack Industries -vs- Joseph Mbiti Munyao** where, Honourable Justice Alnasir Ali stated as follows:-

"...He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily caused by someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

Counsel therefore urged the Court to find that the Appellant did not adduce any evidence to demonstrate negligence on the part of the Respondent and that the Appellant failed to prove culpability on the part of the Respondent.

14. Regarding the nature of the injuries, Counsel submitted that the Appellant alleged that he sustained a dislocation of the left wrist joint which caused it to be swollen, painful and tender. He was treated at Midhill Hospital. He was

examined by Dr. G. K. Mwaura who prepared a Medical Report dated 25th April, 2018. According to the Medical Report, the Appellant sustained a swollen painful, tender left wrist and dislocation of the left wrist joint. Dr. Mwaura noted that the only complaint by the Plaintiff at the time of examination was pain and tenderness. Counsel therefore submitted that assessment of general damages at Kshs. 80,000 would be reasonable in the circumstances and urged the Court to rely on the decision in Machakos HCCA No E171 of 2021. **Analo -vs- Dickson Mwangi Irungu**. It was clear that the Appellant had sustained injuries to anterior chest wall, cut wound on right foot and joint injuries to the left knee

DETERMINATION AND DISCUSSION

15. Parties in appeal have correctly appreciated the role of this court as an appellate court which was succinctly laid out in many others the case of **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123** and several other cases. It is a serious act to overturn the decision of a trial court which had the benefit of hearing witness and observing their demeanour. Further, provided that the

decision of the trial court reflects a reasonable analysis of evidence and a reasonable consideration of legal principles concerning the case before the trial court, it matters not that as an appellate court I could have reached a different decision.

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The main thrust of this appeal is that the trial court erred in holding that there was no employer-employee relationship between the respondent and the appellant. The trial court proceeded on the premise that the burden of proof was on the appellant to establish that relationship. It is instructed that apart from filing a response to the claim, the respondent never called any witnesses. Whereas under section 47(1) the burden of proof in a claim for unfair termination is mutually exclusive, in that failure by an employee to prove unfair termination does not lessen the burden on the part of the employer to justify the reason for termination, however failure to call or provide evidence in rebuttal to an

allegation of unfair termination by a claimant, creates a more probable impression that the employer had no justification for terminating the employee's service.

Further, the appellant claimed he was hired on an oral contract hence under section 10(7) of the Employment Act, in a claim for unfair termination where the contract of employment is oral, the burden is on the employer to disprove any allegation by the employee as to a term of the oral contract.

17. Moreso, under section 74 of the employment Act, it is the responsibility of the employer to keep employee records. The employer in this case, the respondent, did not deem it necessary to keep this claim beyond filing the statement of response. In the circumstances the trial court erred in finding that there was no employer-employee relationship between the appellant and the respondent. This finding is therefore set aside and substituted with an order that there was an

employer-employee relationship between the appellant and the respondent.

18. Having found as above, it goes without saying that the respondent owed the appellant duty of care to provide a safe system of work and working condition. The Respondent was involved in construction industry which is prone to accidents whereas work injuries cannot possibly be totally avoided. The employer is required by law to take reasonable steps to provide a safe working system and provide protective gear that could minimize injury from falling objects. The Respondent never availed themselves at the trial to rebut the allegation by the appellant that it never enabled a safe working environment and that it provided protective gear. The trial court therefore had no reason not to believe the appellant hence erred in not attributing negligence on the respondent.

19. Regrading the quantum of damages, the trial court stated that if it were to find for the appellant, he could have awarded Kshs. 180,000/- as reasonable compensation and Kshs. 3,500/- as special damages. These have not been hotly contested and the court having found for the appellant, it is toward him the same.

20. In execution of this Court's orders as follows:

- a. The judgment of the trial court dismissing the appellant's claim is hereby set aside and substituted with an order allowing the claim and awarding the appellant as against the respondent a sum of Kshs. 180,000/- as general damages for negligence and Kshs. 3,500/- as special damages.
- b. The appellant shall further have the costs of this appeal and costs at the trial court.
- c. The sum awarded as general damages for negligence shall attract interest at court rates from the date of judgment until payment in full.

21.

It is so ordered.

Dated at Nairobi this 13th day of March 2026
Delivered virtually this 13th day of March 2026

Abuodha Nelson Jorum
Presiding Judge-Appeals Division

