



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 33 OF 2016

BERLYN AWUOR ONYUKA.....APPELLANT

VERSUS

LINET AUMA OTIENO.....RESPONDENT

(Being an appeal from an order of the CM's Court Homa Bay in civil case No.33 of 2014 – Hon. P. Mayova (SRM), dated 20th July 2016)

JUDGMENT

1. This appeal arises from the decision of the Senior resident Magistrate at Homa Bay in **CMCC NO.33 OF 2014**, in which the appellant, **BERLY AWUOR ONYUKA**, sued the respondent, **LINET AUMA OTIENO**, for the sum of Kshs.60,000/= together with interest on the sum at a commercial rate of 36% per annum.

2. It was pleaded in the plaint dated 26th March 2014, that both the appellant and the respondent are teachers by occupation. They both worked within the town of Homa Bay and in the month of April 2013, they harboured the idea of venturing into a fish products business. In that regard, the appellant raised a sum of Kshs.60,000/= and handed it over to the respondent. However, the business failed to take off and the appellant sought a refund of her money from the respondent.

3. The appellant pleaded that the money was obtained by her from Elimu Sacco society as a loan payable for a period of one year at an interest rate of 3% per month on a reducing balance and through the check off system.

That, despite several demands and notices of intention to sue being made to the respondent, she failed, ignored, refused and/or neglected to refund the amount. It was then that the present suit was filed against the respondent. The appellant therefore prayed for judgment against the respondent in terms of the prayers in the plaint.

4. In the statement of defence dated 8th April 2014, the respondent pleaded that the appellant and herself were indeed teachers employed by the Teachers Service Commission (TSC) but they were restricted from acquiring any loan from Elimu Sacco Society unless it was for purposes of school fees only. She (respondent) denied the allegations made against herself by the appellant and contended that they were not allowed as teachers, to engage in any business other than that of teaching. She prayed for dismissal of this suit.

5. Both the appellant and the respondent testified at the trial. It was the appellant's testimony that the respondent and herself apart from being teachers were also friends who shared a lot. They therefore agreed to venture into this business of selling fish products from Capital Fish. Each of them was to contribute a sum of Kshs.100,000/= towards that end. She (appellant) secured a loan of Kshs.60,000/= from Elimu Sacco and handed it over to the respondent in her (appellant's) house.

6. The appellant went on to testify that the money was handed to the respondent in the presence of the appellant's house help and a visitor called **SUSAN ATIENO (PW3)** who stated that she witnessed the money being given to the respondent by the appellant who testified further that after receiving the money, the respondent went away. She (respondent) later engaged in giving excuses for the failure to start the proposed business. Consequently, the appellant instructed her lawyer to issue a demand notice to the respondent for the refund of the Kshs.60, 000/=.

7. The appellant testified that she also reported the matter to the police whereupon the respondent promised to obtain a loan and refund the due amount. Several attempts were also made to arbitrate the matter through the Teachers Trade Union – Kenya National Union of Teachers (KNUT) but all this was in vain as the respondent failed to turn up at the offices of the Union. Eventually, the appellant instituted this suit.

8. The appellant's house help, **MARGARET ANYANGO AKAL (PW2)**, stated that she was at the appellant's house on a day in the month of April 2013, when the appellant arrived home with her friend, the respondent. She (PW2) then saw the appellant giving some money tied with a plastic (rubber) band to the respondent who hurriedly counted it. She (PW2) said that the money amounted to Kshs.60, 000/=.

9. The appellant's visitor (PW3) confirmed that the appellant arrived home with the respondent on the material date. Thereafter, the appellant entered the bedroom and came out with a brown purse from which she removed money, counted it and said it was Kshs.60,000/= and then gave it to the respondent.

10. The respondent's denial of the claim was reiterated in her testimony in court. She contended that she had never been involved in any fish business, but before being employed by the TSC she owned a wines and spirits shop. This was in the year 2003. She further contended that she only guaranteed the appellant when she obtained a loan of Kshs.100, 000/= for school fees. She (respondent) stated that the appellant's house help was actually one **CAROLINE NYAUKE** and that the two witnesses called by the appellant i.e. PW2 and PW3, were bought and coached on what to say in court. She contended that the appellant never gave her any money for purposes of starting a business.

11. After considering the evidence in its totality, the learned trial magistrate concluded that the appellant had failed to prove her case to the required standard. The learned trial magistrate therefore dismissed the appellant's case with costs to the respondent. Being dissatisfied with the decision of the learned trial magistrate, the appellant preferred this appeal on the basis of the grounds contained in the memorandum of appeal dated 4th August 2016.

12. The said grounds as viewed together are a basic complaint by the appellant that the trial court failed to properly or at all evaluate the evidence on record and ended up dismissing her case without good cause. This was fortified by her submissions in this appeal through the learned counsel, **MR. OSORO**, the respondent in her submissions herein was of the contrary view, she urged this court to dismiss the appeal as the learned trial magistrate decided the case on its merits.

13. As a first appellate court, the duty of this court was to reconsider the evidence and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, **SELLE -VS- ASSOCIATED MOTOR BOAT CO. (1968) EA 123**). In that regard, the evidence by both parties was freshly considered by this court hereinabove. It is therefore the opinion of this court that although the evidence by the appellant and her witnesses was meant to prove on the balance of probabilities that she gave a sum of Kshs.60,000/= to the respondent, it failed to do so.

14. The burden to establish the case to the required standard lay with the appellant. It was not therefore the respondent's obligation to show why the appellant would be demanding what was not given by her. Basically, the trial court decided the case on the basis of the credibility of the witnesses such that the appellant's evidence was disbelieved in favour of that of the respondent.

15. On matters of credibility, the trial court was in a better position than this court to make the necessary findings, the reason is simple. It is the trial court which heard and saw the witnesses. It was better positioned to gauge the credibility of the parties and their witnesses and in so far as it found the evidence of the appellant to be wanting in credibility it acted properly to dismiss the appellant's case.

16. Even to this court, the contradictory nature of the appellant's entire evidence rendered it not worthy of any belief. The evidence by the so called eye witnesses (PW2 and PW3) was suspect as they stated different things yet they are said to have been together and present when the appellant allegedly gave the respondent some money.

17. In as much as the appellant wanted the trial court to uphold her claim, she was obliged to provide cogent and credible evidence in support thereof. There was no documentary evidence to lend credence to her claim and the oral evidence that was provided did not pass the credibility test. In fact, it was not clear what the money was for. It is not said to be a friendly loan and neither was there any material to suggest that it was for a business venture. It could have been for anything legal or illegal.

18. What if the money was proceeds from an illegal activity? Would the appellant be capable of enforcing its recovery? What if its disappearance was a consequence of a failed business? Any person venturing in an unfamiliar business always takes a risk of losing money and a person who falls victim to con-artists have no one to blame but himself/herself. If at all, the appellant surrendered her money to the respondent or anyone else for purposes of a business venture, she has herself to blame if this business failed to take off and her money consumed in the process. She cannot be heard to demand what is lost in her quest to start a business. It is usually said "**when the deal is too, think twice.**"

19. All in all, this appeal is devoid of merit. This court must and hereby upholds the decision of the lower court to the extent that the appeal is dismissed with costs to the respondent who shall also have costs of the suit in the lower court.

20. Ordered accordingly.

J.R. KARANJAH

JUDGE

[Dated and signed this 19th day of June, 2018]