



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL APPEAL NO. 253 OF 2002**

**STEPHEN KIIRU MUTUVA .....APPELLANT**

**VERSUS**

**JANE WAITHERA MUNGAI .....RESPONDENT**

**(Being an Appeal from the Judgment delivered by the Honourable G.P. Ngare District Magistrate II on the 30<sup>th</sup> of April 2002 in Thika Resident Magistrate's Court Civil Case No. 1086 of 2001.)**

**JUDGMENT**

1. Vide a plaint dated 26<sup>th</sup> October, 2001 Jane Waithera Mungai (Respondent) who was the plaintiff in the lower court sued the Defendants, Stephen Kiiru Mutuva (Appellant) and one Mr. Wanyonyi. The Plaintiff's case was that the Defendants unlawfully carried away the following goods from her house:

**“(i) Cash ksh.11,000/=**

**(ii) 2 sofa sets**

**(iii) 2 coffee tables**

**(iv) One television set – black and white**

**(v) Dining table and its 6 chairs**

**(vi) Solar battery and solar panel**

**(vii) Pressure lamp**

**(viii) Gas cooker 2 burners and its gas cylinder, regulator and gas**

**(ix) A bicycle**

**(x) Household tools namely hammer, axe and wall clock.”**

2. The Plaintiff's prayer was for the restitution of her goods or the value thereof.

3. The Defendants filed a statement of defence and denied the claim. The Defendants claim was that the Plaintiff owed Ekalakala Business Women's Group (hereinafter the women's group) the sum of Ksh.41,470/= which she had refused to pay. The 1<sup>st</sup> Defendant was the Chairman of the said group and on behalf of the group and his own behalf counter-claimed for the said sum of Ksh.41,470/=. The counter claim was denied.

4. At the conclusion of the case the lower court entered judgment in favour of the plaintiff as prayed in the plaint. The 1<sup>st</sup> Defendants counter-claim was dismissed.

5. The 1<sup>st</sup> Defendant was aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:

a) That the trial magistrate erred in finding that the attachment was unlawful.

b) That the trial magistrate erred in dismissing the counter claim

c) That the judgment was against the weight of the evidence.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“An appeal to this Court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

7. The Plaintiff (PW1) testified that the Defendants led a group of people who carried away the goods in question from her house. The Plaintiff described the 1<sup>st</sup> Defendant as her successor as the chairman of the women's group. The Plaintiff's evidence was that she did not owe the women's group any money and neither was she shown any court order or any warrants of attachment.

8. The 1<sup>st</sup> Defendant (Appellant) Stephen Kiiru Mutuva testified as (DW1). He described himself as a business man and the then chairman of the women's group. He produced the group's registration certificate and constitution. His evidence was that the Plaintiff who was the group's then chairlady left office after it was discovered that the amount of Ksh.41,470/= was missing. That a demand letter for the said amount was written to the Plaintiff but she did not refund the same. That the group made a report of the matter at Ekalakala police post. That the Plaintiff agreed to repay the money but failed to do so, hence attachment of her goods. That the groups constitution gave the group the authority to attach the plaintiff's belongings. In the company of a police officer, the group members proceeded to the Plaintiff's house and carried away the goods that were in the sitting room. A list of the said goods was produced as an exhibit. DW1 denied that any gas cylinder or money were carried away from the Plaintiff's house. He further stated that the Plaintiff had not fully repaid a loan of Ksh.15,000/= as there was a balance of Ksh.2,410/= which was yet to be paid.

9. DW2 James Maingi Musyoka the groups secretary produced a book which contains the entries of the collection made on the 11<sup>th</sup> December, 2000 and 18<sup>th</sup> December, 2000. His evidence was that those contributions were not banked by the Plaintiff hence the attachment. DW2's further evidence was that 27

group members went to the house of the Plaintiff and carried away 28 items. His further evidence was that the Plaintiff did not dispute the claim of Ksh.41,470/= which included the loan balance of Ksh.2,410/=. DW3 Joseph Wambua Ngang'a another group member gave a similar account of evidence as DW2 on the issue of the Ksh.41,470/= and the goods taken from the Plaintiffs house.

10. From the evidence on record, it comes out that the parties herein were at the material time members of the women group which was registered by the Ministry of Culture and Social Services on 12<sup>th</sup> June, 2000 and issued with a certificate of registration which was produced in court as an exhibit.

11. The bone of contention herein revolves around the goods carried away from the Plaintiff's house. The Plaintiff enumerated the goods carried away from her residence. The Defendants did not deny that some goods were carried away from the Plaintiff's house. Indeed the list of 28 items carried away made by the defendants and produced as an exhibit herein reflects most of the goods in the Plaintiffs list except the cash stated as Ksh.11,000/= and the gas burner, cylinder and regulator. The Defendants list of the goods carried away includes more household items than the Plaintiff's list.

12. The Defendants evidence that they carried away the Plaintiff's goods as per the groups constitution is not supported by the document produced as the group's constitution. I have perused the said entire document from Article 1-10. Article 7 provides that the group can **"confiscate the members pledged security items"** Article 9 of the document lists down the household goods that can be used as collateral for a loan and proceeds to state that the attached goods can be sold within a weeks time. The document does not set out the procedures for attachment and removal of goods. It is therefore not surprising that a big group of about 27 people proceeded to the plaintiff's house and carried away the goods in question. It is evident that due process was not followed

13. The loan forms filled in by the Plaintiff for the loan of Ksh.15,000/= were not produced as an exhibit. According to the Plaintiff, she had only offered a TV, a battery, a bicycle and a radio cassette as the security for the loan which she fully repaid. However, there are no details in the Plaintiff's evidence on where exactly she had kept the sum of Ksh.11,000/= and where she had gotten it from. The evidence from the Defendants side lumps up together the amount said to have been embezzled and the loan balance. Embezzlement is a criminal offence and a report ought to have been made to the police. Criminal acts cannot be said to have been covered by the group's constitution.

14. The 1<sup>st</sup> Defendant's counter claim of Ksh.41,470/= is for the amount of money allegedly misappropriated by the Plaintiff and the balance of unpaid loan. This claim is supported by the evidence of the defence witnesses. The Plaintiff was not the groups treasurer. The evidence by the defence is that the groups treasurer was unwell on the 11<sup>th</sup> and 18<sup>th</sup> December, 2000 when the collections in question were made. The exercise book produced as an exhibit which contains the list of the group members contributions has several cancellations and it is difficult for the court to establish the exact amount collected. No statement of account was produced. The bank statement said to reflect that the said amount of money was not banked was not produced as exhibit

15. With the foregoing evaluation of the evidence, my conclusion is that the Plaintiff's evidence failed to prove on a balance of probability that any other goods beyond the meticulously prepared list of the 28 items prepared by the group were taken away from her house. The counter claim was likewise not proved. I agree with the judgment of the lower court for the return of the Plaintiff's goods or the value thereof except the claim for the refund of Ksh.11,000/=. the gas burner, cylinder and regulator fails. The counter claim by the Defendants also fails.

16. This appeal having been partially successful, each party to meet own costs. The costs in the lower court to the Plaintiff/Respondent.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of Jan., 2017.

**B THURANIRA JADEN**

**JUDGE**