



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 84 OF 2010

(Arising from Civil Case No. 2659 of 2008 of the Resident Magistrate's Court at Mombasa: M.O. Kizito – S.R.M.)

BENARD ONGAYO NYARIGE APPELLANT

=VERSUS=

RAMADHAN LEWA KALUME RESPONDENT

JUDGEMENT

The Appellant herein **BERNARD ONGAYO NYARIGE** has filed this appeal against the decision of the learned Senior Resident Magistrate in **RMCC 2659 OF 2008** dismissing his (the Appellant's) claim for the sum of Kshs.400,000/- against the Respondent.

The Appellant had filed a plaint dated 11th November 2008 seeking the following prayers as against the Respondent:

- “(a) Kshs.400,000/- as set out above**
- (b) Costs of and incidental to this suit**
- (c) Interest thereon at court rates from 1st October 2008 till payment in full”**

In his evidence before the trial court the Plaintiff averred that on or about September 2008, he had advanced to the Respondent the sum of Kshs.500,000/- by way of a friendly loan. The Respondent refunded the sum of Kshs.100,000/- but failed to refund the balance of Kshs.400,000/- despite a written agreement between the two parties. The Respondent's failure to refund this balance of Kshs.400,000/- led to the present proceedings.

In his defence the Respondent denied ever having borrowed a sum of Kshs.500,000/- from the Appellant and further denied owing to the Appellant this amount. The matter was heard by the learned trial magistrate who in his judgement delivered on 29th April 2010 dismissed the Appellant's claim in its entirety. Being aggrieved by this decision the Appellant filed this appeal. **Mr. Onyango** Advocate appeared for the Appellant whilst **Mr. Lewa** appeared for the Respondent. By the consent of both parties the appeal was argued by way of written submissions.

As a court of first appeal it is my obligation to re-evaluate the evidence adduced before the lower court and to make my own independent findings thereto. The learned trial magistrate in his judgement

found that the Appellant failed to prove his case beyond a balance of probability. With respect I cannot agree. **PW1** told the court that he had advanced to the Respondent the sum of Kshs.500,000/- as a loan. There was evidence from **PW2 EVANS MENYANYA** to corroborate this testimony. **PW2** told the court that he was present and actually saw the Appellant hand to the Respondent this sum of Kshs.500,000/-. The evidence given by **PW2** was not controverted or discredited in any way and ought not to have been ignored by the trial court. In his judgement at page 3 line 12 the trial magistrate stated that:

“Similarly, the plaintiff’s [PW1’s] evidence and that of PW2 that he advanced to the Defendant a friendly loan of Kshs.500,000/- is inconsistency (sic) with the pleadings in paragraph three of the plaint which shows that he advanced him a friendly loan of Kshs.400,000/- only. The said inconsistencies make it difficult for me to believe the plaintiffs evidence and that of PW2 that he advanced a friendly loan of Kshs.500,000/- to the Defendant.”

In this the learned trial magistrate erred in fact. The truth of the matter which came out clearly from the evidence is that although the Appellant stated that he did loan to the Respondent the sum of Kshs.500,000/- he (the Appellant) later clarified that the Respondent refunded him the sum of Kshs.100,000/- leaving a balance of Kshs.400,000/- unpaid. This evidence was confirmed by **PW2** who stated in his evidence at page 4 line 12:

“The defendant/respondent paid the plaintiff Kshs.100,000/- at the Hotel when we met there leaving a balance of Kshs.400,000/- which was to be liquidated in two days by the defendant”

It is clear therefore from the evidence of the Appellant and **PW2** that although the total amount of the loan was 500,000/- the Respondent did pay off Kshs.100,000/- of this amount leaving a balance of Kshs.400,000/- which is the amount the Appellant was claiming in his suit. It was therefore incorrect of the trial magistrate to assert that an inconsistency existed between the pleadings in the plaint and the evidence on record. Such inconsistency (if any) has been properly and adequately explained.

Furthermore in his judgement at page 3 line 17, the learned trial magistrate continues to dismiss the suit saying:

“I find the evidence of the plaintiff and that of PW2 to be unreliable and untrustworthy”

The trial magistrate does not proceed to explain just what was unreliable or untrustworthy about this evidence. The Plaintiff and his witness both gave consistent evidence and corroborated each other in all material aspects. It was not in order for the trial court to simply dismiss their evidence without giving reasons.

The question in issue is whether the Appellant did in fact advance to the Respondent a friendly loan in the amount of Kshs.500,000/- as he has alleged. The Plaintiff gave evidence in this regard which evidence was duly corroborated by his witness **PW2**. In addition the Plaintiff produced as evidence an **‘Agreement on Refund of Money’** in which the Respondent agreed that he would refund to the Appellant this sum of Kshs.500,000/- on or before 8th October 2008. The same agreement indicates that the Respondent did pay to the Respondent a sum of 100,000/- leaving a balance of 400,000/- unpaid. This agreement was witnessed by **PW2** in whose presence the same was made.

On his part the Respondent denied ever having borrowed any money from the Appellant. The trial magistrate in his judgement at page 3 line 17 appears to accept the Respondent’s defence when he states:

“I therefore believe the Defendant’s evidence that he never borrowed any money from the Plaintiff”

Once again the learned trial magistrate has not explained why he agreed with the Defendant’s case. From my own analysis the Defence was wanting in several aspects and the trial magistrate simply took the easy way out in accepting this defence without bothering to interrogate the same. The Respondent admits that he did sign this agreement, binding himself to refund to the Appellant the sum of Kshs.400,000/-. He

states clearly at page 7 line 16:

“I signed exhibit 1 [the agreement]. My national identity card number appears on exhibit 1. Exhibit one is dated 8th October 2008”

However the Respondent alleges that he was coerced and forced by police to sign the agreement at Urban Police Station in order to prevent a charge being levied against him. The Respondent further states that his friend one **FAUZ ATHMAN** persuaded him to sign the agreement in order to secure his release from the police station. Firstly, as conceded by the Respondent there is no evidence to show that this agreement was actually drawn up and signed at a police station. No police officer has signed as a witness to the same. Although the Respondent claims that police **‘forced’** him to sign this agreement he made no complaint to any authority that he had been forced by police to sign a **‘false document’**. Further the Respondent despite claiming that he was assaulted by police to coerce him to sign the agreement has failed to produce any evidence of this so-called assault. No report was made to any authority about his alleged assault by police and he has failed to avail any P3 form, or treatment notes to prove that such an assault did occur. Although the Respondent stated in his evidence at pages 7 line 35:

“Fauz Athman is the one who encouraged me to sign the Agreement after I had perused and studied it ...”

However the said Fauz Athman who was the Respondent’s own witness contradicted this evidence when he stated under cross-examination stated at page 9 line 36:

“I never advised the Defendant to sign the Agreement. I never told the Defendant that he could only get back his freedom by signing the Agreement. I have not stated in my evidence in chief that the Defendant was assaulted by a police officer. I do not know who prepared the Agreement. I was not present at the place where the Defendant signed the Agreement. I never saw the Defendant signing the Agreement”

By these words **PW2** effectively contradicted all that the Respondent had told the court. It is curious how in light of such inconsistencies and contradictions the learned trial magistrate still proceeded to find the Respondent’s evidence **‘believable’**. The magistrate clearly misdirected himself in this respect. The record shows clearly that the Respondent’s evidence was totally discredited and was infact revealed to be a pack of lies.

From my own re-evaluation of the evidence on record, I am satisfied that the Appellant did infact prove his claim upon a balance of probabilities. There was a witness who saw the Appellant hand over this money Kshs.500,000/- to the Respondent and the Respondent by his own admission wrote and signed an agreement binding himself to refund to the Appellant the sum of Kshs.400,000/-. The fact that the Respondent signed such an agreement is proof enough that he did owe to the Appellant this sum of Kshs.400,000/-. I find that the learned trial magistrate erred in delivering a judgement which was clearly at odds and at variance with the evidence tendered in court. I hereby set aside the judgement of the trial court dated 29th April 2010. I further hereby substitute the same with an order/decreed in favour of the Appellant for Kshs.400,000/- plus costs and interest at court rates from the date of filing of this suit until payment in full. It is so ordered.

Dated and Delivered in Mombasa this 19th day of May 2011.

**M. ODERO
JUDGE**

In the presence of:

Mr. Lewa for Respondent

No appearance for Appellant