



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 6 OF 2005

DANIEL WACHIRA KINYUA.....APPELLANT

VERSUS

SUSAN WANJIRU KARANI.....RESPONDENT

(Being appeal against the judgment of Alex K. Ithuku, Resident Magistrate in Kerugoya Senior Principal Magistrate's Civil Case No. 330 of 2004 delivered on 14th February 2005)

JUDGMENT

Susan Wanjiru Karani the Respondent herein, sued Daniel Wachira Kinyua, the Appellant herein by way of a plaint dated 13th July 2004 filed before the Principal Magistrate's Court Kerugoya. In the aforesaid Plaint, the Respondent sought for judgment in the following terms *inter alia*:

- (i) Ksh.63,600/= plus interest at the rate of 40% per month until full payment**
- (ii) Costs of the suit.**
- (iii) Interest on (i) and (ii) above at court rates.**

The Appellant filed a defence to deny the Respondent's claim. The suit was heard by Honourable A. K. Ithuku, learned Resident Magistrate who entered judgment in favour of the Respondent (Plaintiff) as prayed on 14th February 2005. The Defendant (Appellant) was aggrieved hence this Appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum:

- 1. The Learned Resident Magistrate went wrong and misdirected himself in fact that he failed to properly keep complete record of all the proceedings which admission is indication of judicial bias.**
- 2. The findings and judgment of the Learned Resident Magistrate are contrary to evidence adduced before him.**
- 3. The Learned Resident Magistrate having framed the issues went wrong and erred in law in not making any findings upon any of the said issues.**
- 4. The Learned Resident Magistrate erred in law and in fact in failing to consider the fact that the respondent did not establish whether there was any balances on the 3rd of April 2002 and deliberate omission even to record in the proceedings.**
- 5. The Learned Resident Magistrate erred in his findings in his conclusion that the Appellant was**

in a debt of the respondent when there was no evidence.

6. The Learned Resident Magistrate erred in law and in fact in putting full reliance of an agreement to arrive at his decision when such agreement was traversed by the appellant.

7. The Learned Resident Magistrate misdirected himself on burden of proof in Civil Cases.

Learned Counsels appearing in this matter recorded a consent order to have the appeal determined by written submissions.

Let me start by setting out in brief the case that was before the trial court. The Plaintiff's case was supported by the evidence of the Appellant. Susan Wanjiru Karani (P.W. 1), told the trial Court that on 5th February 2002, Daniel Wachira Kinyua (appellant), visited her home with the sole intention to seek for a friendly loan. P.W. 1 said she executed an agreement with the Appellant before an advocate where she advanced the Appellant Ksh.10,000 on condition that he would repay with interest of Ksh.4,000/= within one (1) month. i.e. on or before 5th March 2002. There was also a condition that in default the Appellant will be required to pay a monthly rate of interest at 40% as a penalty. The agreement was executed before Mr. Magee Wa Magee, learned advocate. The Appellant defaulted and only went to see the Respondent after three (3) months claiming he had no money. In the month of June 2002, it is said the appellant paid the Respondent Ksh.20,000/= with a promise to pay the balance of Ksh.6000/= in July 2002. The Appellant failed to fulfill his promise and the outstanding sum continued to attract interest at the rate of 40% of the outstanding debt per month. At the time of filing suit, the outstanding sum stood at Ksh.63,600/=. The agreement was produced as an exhibit in evidence. **Daniel Wachira Kinyua (D.W. 1)**, the Appellant, told the trial Magistrate that he indeed sought for financial accommodation from the Respondent. He admitted they reduced their agreement into writing where they mutually agreed that he would repay the loan plus interest at the rate of 40% per month. The appellant averred that he paid Ksh.18,000/= to the respondent on 3rd April 2002. He was of the view that he settled the outstanding debt when he paid Ksh.18,000/=. The record shows that the trial learned Resident Magistrate considered the evidence from both sides and found the Plaintiff's (Respondent's) evidence to be more credible than that of the Defendant (Appellant). He found the case in favour of the Respondent.

On my part, I have re-evaluated the evidence and I have come to the conclusion that the following factors are indisputed:

First, the parties executed an agreement containing the terms and conditions. Secondly, that there was a breach of the agreement on the part of the appellant. The question which must be determined is what remedy is available for the Respondent? According to the Respondent, the appellant only went to her three months after receiving the loan amount. The Appellant on his part stated that he went back to the Respondent after the lapse of two months i.e. on 3rd April 2002. The Respondent avers she was paid Ksh.20,000/= in the month of June 2002, leaving a balance of Ksh.6000/= unpaid. The Appellant says he settled the debt in full on 3rd April 2002 when he paid the respondent Ksh.18,000/=. The learned resident Magistrate believed the evidence of the Respondent though he did not attach any reasons that enabled him to believe so. There is no doubt that though the agreement was reduced into writing, the respondent did not issue any receipt to acknowledge receipt of payments from the Appellant.

Having set out the case before the trial court, let me now turn my attention to the appeal. This appeal in my view, will heavily be determined by looking at the manner in which the learned trial Resident Magistrate dealt with the evidence. It is true that the trial magistrate was faced with a difficult situation where he had to weigh which to believe between the evidence of the Appellant and that of the Respondent. I have already stated that he went ahead to find that the evidence of the Respondent was credible without attaching any reasons. He did not even make any observation on the demeanour of the witnesses. On my part, I am aware that this being the first appellate court, the parties are entitled to a re-evaluation of the case that was before the trial court. The Defendant (appellant) told the trial court that he paid the Plaintiff (Respondent) Ksh.18,000/= to settle the entire debt plus interest i.e. Ksh.10,000

(principal sum) plus Ksh.8000 representing interest which accrued in the months of March and April 2002. The Respondent claimed the Appellant went to see her in the month of June 2002 whereby he paid her Ksh.20,000/= leaving a balance of Ksh.6000. The conduct of the Respondent makes me to disbelieve her story. If indeed, the Appellant paid the respondent Ksh.20,000/= in the month of June 2002, then why didn't the Respondent demand the balance within a reasonable time. There is no evidence that she demanded for payment of the outstanding debt. It is not even alluded by the Respondent whether she made a verbal demand to the Appellant. The Respondent waited from June 2002 until 13th July 2004 to file the suit. She waited for a period of 24 months. What motivated her to wait for such a long period? The Respondent pleaded in paragraph 7 of the Plaint that she served the appellant with a demand notice. She did not give any evidence whether oral or documentary to show that she demanded for payment. The Respondent's conduct lends credence to the Defendant's (Appellant's) claim that he repaid the outstanding loan plus interest in full on 3rd April 2002. Had the Respondent been indebted, she would have demanded for payment almost immediately. I do not believe her. The learned Resident Magistrate fell into error when he believed the Plaintiff (Respondent) without attaching any reasons for believing her.

In the end and on the basis of the above reasons, I allow the appeal. The judgment of the trial court delivered on 14th February 2005 is set aside and is substituted with an order dismissing the suit. The Appellant is awarded costs of the appeal and the suit.

Dated and delivered at Nyeri this 23rd day of September 2011.

**J. K. SERGON
JUDGE**

In open court in the presence of Macharia holding brief Kahiga for Respondent. No appearance for the Applicant.