



**Oricho v Ndolo (Civil Appeal E016 of 2024)
[2025] KEHC 3417 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E016 OF 2024**

**DK KEMEL, J
MARCH 21, 2025**

BETWEEN

VINCENT OUMA ORICHO APPELLANT

AND

SHEM DAVID OCHIENG NDOLO RESPONDENT

(Being an appeal from the judgment of the Small Claims Court at Siaya by Hon. JP Mkala (RM) Adjudicator delivered on 19th March 2024 in Siaya SCCCOMM No. E018 of 2024; Shem David Ochieng Ndolo Vs. Vincent Ouma Oricho)

JUDGMENT

1. The appeal herein arises from the decision of the Small Claims Court adjudicator Hon. Mkala delivered on 19/3/2024 wherein he allowed the Respondent's claim for Ksh60,000/= plus costs and interest.
2. Aggrieved by the said judgment, the Appellant filed his Memorandum of Appeal dated 12/4/2024 wherein he raised the following grounds of appeal:
 1. That the learned trial magistrate erred in law in providing that the alleged document was signed by the defence when the same was under dispute.
 2. That the learned trial magistrate erred in law and in fact in ignoring the police OB report.
 3. That the proceedings before trial court were null and void because the documents presented to court by the Respondent were under police investigation for forgery.
 4. That the alleged document was so vague that it did not meet the legal requirement.
 5. That the learned trial magistrate erred in finding that the allegation used in the agreement in issue had not been proved to be true, correct or otherwise.



6. That the learned magistrate did not consider evidence adduced during the hearing as proof of the Respondent's fraud by receiving monies from the Appellant's sister.
7. That Section 67 provides that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the hand writing of so much of the document as alleged to be in that person's handwriting must be proved to be in his handwriting.
8. That the learned trial magistrate erred in law and in fact in disregarding the Appellant's defence.

The Appellant therefore prayed that the appeal be allowed with costs.

3. This being a first appeal, this court's duty is well spelt namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at an independent analysis as to whether or not to uphold the decision of the trial court. This court will also take cognizance of the fact that it did not have the benefit of seeing or hearing the witnesses testify. See *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123.
4. The Claimant Shem David Ochieng testified that he had lent the Appellant Kshs70,000/= which was to be refunded on 18/10/2023. That the Appellant only refunded a sum of Kshs10,000/= leaving a balance of Kshs60,000/= unpaid. That the Appellant refused to refund the money and informed him to go to court. That he went to court as suggested only for the sister of the Appellant to issue threats. That he lodged a report to the police over the said threats vide OB No. 43/04/03/24. That he had lent the Appellant the money in cash as he had a problem at his home which he wanted to sort out.

On cross examination, he stated inter alia; that he had known the Appellant for four years; that the Appellant gave him a copy of his identity card; that he gave the money to the Appellant on 28/7/2024; that the Appellant gave him his copy of the identity card at the time of the agreement.

5. The Appellant Vincent Ouma Oricho testified that he met the Respondent who introduced himself as an employee of Siaya County Public Service Board. That he requested the Respondent to consider him for an accountancy job and that he promised to connect him once the vacancy arises. That the Respondent assured him and that he requested him for his identity card and KCSE certificate. That he (Appellant) lent him Kshs20,000/= and that he would refund him once he gets his monthly salary. That he could not raise the said sum and thus paid to him Kshs10,000/= which he later failed to pay. That he was later served with court summons and that he reported to the police over the forged signature on the alleged agreement with the Respondent. That the signature on the agreement does not belong to him in that he had not even known the Respondent by the said date. That he does not owe the Respondent any money and that it is the Respondent who owes him money.

On cross examination, he stated inter alia; that he came to know the Respondent through his (Appellant) sisters; that they met at the hotel when he gave Kshs10,000/= to the Respondent; that he has not seen any documents showing that the Respondent works for the Government; that he did not report the Respondent to the Government.

6. The appeal was canvassed by way of written submissions. Both parties duly complied.
7. I have considered the record of the lower court and the submissions filed herein. I find the issue for determination is whether the Respondent's case was proved on a balance of probabilities.
8. The Respondent's claim was for a sum of Kshs60,000/=. He produced an agreement entered between the Respondent and Appellant dated 28/7/2023 wherein the Appellant received Kshs70,000/= and who was to refund the same on or before 18/10/2023. The Respondent also produced M-pesa statement showing that the Appellant made payment of Ksh10,000/= on 24/8/2023. The Respondent



therefore sought for payment of the balance of Kshs60,000/=. The Appellant contended that the signature on the agreement was a forgery and that he had since lodged a report to the police and been issued with an OB. The Appellant further contended that the sum of Kshs10,000/= sent to the Respondent was meant to secure the Appellant some job at Siaya County Service Board.

9. The Respondent as the Claimant was under obligation pursuant to the provisions of Section 107 of the *Evidence Act* to prove his claim against the Appellant on a balance of probabilities. Section 107 of the Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The Respondent produced the agreement dated 28/7/2023 and the M-pesa statement dated 24/8/2023 which showed that there was an agreement between him and the Appellant. Up to that point then Ipso facto, the Respondent’s claim stood to sail through if the Appellant failed to controvert the same. The Appellant has claimed that the signature on the agreement is a forgery and further the Kshs10,000/= which he paid to the Respondent was for another issue all together. The Appellant was thus under obligation to back those assertions with evidence. The provisions of Section 107 of the *Evidence Act* kicked in the moment the Appellant raised the claim that the purported signature on the agreement was a forgery. The Appellant maintained that he had lodged a report with the police and was issued with an OB. I find the presentation of the said OB did not pass muster as he ought to have followed up the matter and ensure that the “fake” document was subjected to thorough analysis such as engaging handwriting experts and thereafter come up with an expert report confirming that the Appellant’s signature was indeed a forgery. Hence, I find that the Appellant failed to controvert the evidence of the Respondent regarding the agreement dated 28/7/2023. The Appellant’s ground of appeal that the trial court erred by shifting the burden of proof from the Respondent to him must fail as he was under obligation to prove the allegation of forgery on the document and thereafter controvert the evidence of the Respondent. It is instructive that the Respondent obtained the Appellant’s national identity card at the time of the agreement on 28/7/2023 and that the Appellant has not explained how a copy of his ID card ended up with the Respondent. It is obvious that the Appellant must have handed in the copy thereof in order to secure the friendly loan of Kshs 70, 000/ from the Respondent.

As regards the Appellant’s claim that the Kshs10, 000/= paid to the Respondent was for another issue, I find that the Appellant appeared to give two different versions thereof. Whereas in his witness statement, he claimed that the money was meant to assist him secure a job at Siaya County Government but while giving his evidence he claimed that he had given the money to the Respondent as a debt which was to be refunded in November 2023. It is clear that those are two different versions and which left no doubt that the Appellant was not truthful or candid and thus his evidence did not controvert that of the Respondent. It is baffling that the Appellant could claim that he had lent money to the Respondent yet he claims that he did not know him before and only met him on 24/8/2023. It is highly unlikely that the Appellant could lend money to a stranger whom he met for the first time on 24/8/2023. It is instructive that the Appellant’s claim was made during the hearing of the suit yet he did not file even a counter claim against the Respondent for the said sum of Kshs10,000/= allegedly lent to the Respondent. That being the position, I find the Appellant’s assertion that the trial court failed to consider his defence is devoid of any merit as the same was duly considered and found unbelievable. I am satisfied by the finding of the learned trial magistrate that the Respondent’s claim had been proved on a balance of probabilities. The trial court’s finding was thus quite sound and must be upheld.

10. In the result, it is my finding that the Appellant’s appeal is devoid of any merit. The same is dismissed with costs to the Respondent.

DATED AND SIGNED THIS 21ST DAY OF MARCH, 2025.

D. KEMEI



JUDGE

In the presence of

Ooro F.....Appellant

Shem David Ochieng Ndolo..... Respondent

Mboya.....Court Assistant

