



**Maghanga v Masamo (Civil Appeal E050 of 2024)
[2025] KEHC 6132 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E050 OF 2024
AN ONGERI, J
MAY 16, 2025**

BETWEEN

DUREL MKALA MAGHANGA APPELLANT

AND

PHELISTER NASILOI MASAMO RESPONDENT

*(Being an appeal from the judgment of Hon. D. M. NDUNGI (PM)
in TAVETA PM Civil Case no. E003 of 2023 delivered on 11/7/2024)*

JUDGMENT

1. The appellant filed Taveta PM Civil Case no. E003 of 2023 seeking a refund of Kshs.166,700/= being an amount of money contributed by the appellant to start a business with the respondent.
2. The respondent denied the claim and said she was involved in a love relationship with the appellant and the said amount was a token of appreciation for the love affair.
3. The appellant's case was that he entered into an oral agreement with the respondent in late October 2022 to open a mini bar business jointly as equal partners within Taveta town and that he gave the respondent the money Kshs.166,700/= as starting capital in form of assets and cash.
4. The appellant said that the business was doing well by the end of November the respondent became secretive and declined to reveal sales returns to him.
5. He said she stated at first that she was willing to refund the capital contributed by the appellant and she later changed her position and the appellant served her with a demand letter dated 3rd January 2023 and subsequently filed suit.
6. The respondent denied the claim and said the case is baseless and the same was brought in bad faith after the respondent discovered that the plaintiff was a married man and she terminated their loved affair.



7. The trial court found that there was no contract between the appellant and the respondent and dismissed the appellant's case with no orders as to costs.
8. The appellant has appealed to this court against the dismissal of the suit on the following grounds;
 - i. That the learned magistrate erred in law and in fact by finding that the appellant had failed to prove his case on balance of probabilities.
 - ii. That the learned magistrate erred in law and in fact by disregarding the plaintiff's evidence and submissions thus arriving at a wrong finding.
 - iii. That the learned magistrate erred in law and in fact by deciding that there was no offer between the appellant and the respondent despite cogent evidence on the oral understanding between the parties.
 - iv. That the learned magistrate erred in law and in fact by deciding that the appellant and the respondent had love affair thus the amount contributed by the appellant was a token of appreciation for the sexual relationship.
 - v. That in whole the finding and holding of the learned magistrate as contained in his judgment delivered on 11th July, 2024 is inconsiderate, erroneous, unlawful and unreliable by law.
9. The Appellant in his written submissions seeks to have the appeal allowed and the judgment of the trial court set aside.
10. The Appellant further requests that judgment be entered in his favor against the Respondent. Additionally, the Appellant asks that the costs of the appeal be borne by the Respondent and for any other relief the court deems fit.
11. The appellant submitted that the trial magistrate erred in law and fact by finding that the Appellant failed to prove his case on a balance of probabilities. That the existence of an oral agreement was supported by the Respondent's conduct and previous correspondence acknowledging the debt.
12. Further, that the law recognizes oral contracts, as held in *Ali Abid Mohamed v Kenya Shell & Co Ltd* (2007), where the court ruled that contracts can be inferred from conduct. That the magistrate's failure to consider this amounted to a misdirection.
13. The appellant also submitted that the trial magistrate disregarded crucial evidence presented by the Appellant, including WhatsApp messages, receipts, and records of capital contributions. These documents demonstrated a business relationship and the Respondent's admission of liability.
14. That by ignoring this evidence, the magistrate arrived at an incorrect conclusion. The court should have objectively assessed the parties' conduct to determine the existence of a binding agreement.
15. Further, that the magistrate wrongly concluded that there was no valid offer between the parties despite evidence of an oral understanding.
16. That the law does not require contracts to be in writing, and subsequent conduct can establish their existence. The court in *Thorner v Major* (2009) affirmed that oral agreements are enforceable based on the parties' actions. The magistrate's failure to apply this principle was a material error.
17. Further, that the magistrate's finding that the Appellant and Respondent were in a romantic relationship, and that the funds were a "token of appreciation," was unsupported by evidence.



18. That the Respondent failed to prove this allegation, yet the court relied on it to dismiss the Appellant's claim. The burden of proof rests on the party making the allegation, as per Section 107 of the [Evidence Act](#). The magistrate's conclusion was speculative and legally unsustainable.
19. Finally, that the judgment delivered on 11th July 2024 was erroneous, inconsiderate, and contrary to the law. The magistrate ignored established legal principles and relied on unsubstantiated claims. The decision was based on irrelevant considerations rather than the evidence presented. This resulted in a miscarriage of justice, warranting the appellate court's intervention.
20. The Appellant submitted that he is entitled to the costs of this appeal. The general rule is that costs follow the event, as provided under Section 27 of the [Civil Procedure Act](#). Since the Appellant has been compelled to pursue this appeal due to the trial court's errors, he should be awarded costs as compensation for the litigation expenses incurred.
21. For these reasons, the Appellant urged the court to allow the appeal, set aside the trial court's judgment, and grant the reliefs sought since the magistrate's decision was flawed in law and fact, and justice demands that it be overturned.
22. The Respondent opposed the Appellant's appeal, arguing that no credible evidence was adduced to support the existence of an enforceable oral contract between the parties.
23. That the Appellant, a married high school teacher, concealed his marital status from the Respondent, a young and illiterate woman, and later demanded repayment of financial and material gifts after their romantic relationship ended. The Respondent maintains these were gifts given in affection, not loans or business investments.
24. Further, that the Appellant failed to prove the alleged partnership, offering only unsigned, undated handwritten notes, unverified WhatsApp messages, and irrelevant receipts in the Respondent's name.
25. That no witnesses were called to corroborated his claims, and his conduct—visiting the Respondent's home under the guise of "business discussions"—undermined his credibility.
26. That the trial court rightly dismissed his suit, as gifts motivated by romance are irrecoverable under law.
27. The Respondent urged dismissal of the appeal, affirming the trial court's finding that the Appellant neither proved a valid contract nor justified his claim. Costs should follow the outcome.
28. The respondent's key Points were as follows;
 - i. No proof of an oral contract (no witnesses, inconsistent documents).
 - ii. Monies/gifts were romantic gestures, not loans or business capital.
 - iii. Appellant's evidence lacked credibility (e.g., fabricated records, unexplained receipts).
29. The respondent maintained that the Trial court's decision was sound and that the appeal lacks merit and should be dismissed with costs.
30. This being a first appeal the duty of the first appellate court is as stated in the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment) as follows;

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh



and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others*¹ and in *Peters v Sunday Post Limited*.

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.”

31. The issues for determination in this appeal are as follows;
 - i. Whether there was a valid oral contract between the appellant and the respondent
 - ii. Whether the respondent is liable to refund kshs.166,700 advanced to her in cash and kind.
 - iii. Who pays the costs of this appeal?
32. On the issue as to whether there existed a valid oral contract between the appellant and the respondent, the elements of a valid oral contract are as follows;
 - i. Offer and Acceptance (Mutual Agreement). One party must make a clear offer, and the other must accept it unconditionally.
 - ii. Consideration (Exchange of Value). Both parties must exchange something of value (money, services, goods, etc.).
 - iii. Legal Capacity (Competent Parties).
 - iv. Legal Purpose (Lawful Objective). The contract’s purpose must be legal. An agreement for an illegal act is void.
 - v. Mutual Consent (Meeting of the Minds). Both parties must genuinely understand and agree to the same terms without fraud, duress, or undue influence.
33. In the current case, the duty to prove that there was a valid oral contract between the parties is upon the party alleging it and that is the appellant.
34. I have re-evaluated the evidence adduced by the appellant in the trial court. The appellant produced a sale agreement for land but the same is not between the appellant and the respondent.
35. On the issue as to whether there Was a Valid Oral Contract Between the Appellant and the Respondent, after re-evaluating the evidence, this court finds that the Appellant failed to prove the existence of a valid oral contract for the following reasons;
 - i. Lack of Mutual Agreement (Offer & Acceptance): The Appellant claimed there was an oral agreement to start a business, but no clear terms (profit-sharing, roles, etc.) were established. The Respondent denied any business arrangement, insisting the funds were gifts tied to their romantic relationship. The Appellant did not provide conclusive evidence (e.g., witness testimony, formal business records) to rebut this.



- ii. **Insufficient Proof of Consideration:** While the Appellant submitted receipts and WhatsApp messages, these documents were either unsigned, undated, or lacked contextual clarity (e.g., whether they referred to business contributions or personal gifts). The Respondent’s conduct (alleged secrecy about sales) does not, by itself, confirm a binding partnership.
 - iii. **Contradictory Conduct:** The Appellant’s claim that the Respondent initially agreed to refund the money but later refused suggests a dispute arising from a failed relationship rather than a breached business agreement. The trial magistrate rightly noted the romantic context, which undermines the Appellant’s contractual argument.
 - iv. **Legal Purpose & Capacity:** Even if an oral agreement existed, the Appellant’s concealment of his marital status vitiated mutual consent, as the Respondent may have acted under a misapprehension.
36. I find that in the circumstances, the Appellant did not discharge the burden of proving a valid oral contract on a balance of probabilities (Section 107, *Evidence Act*). The trial court’s dismissal of this claim was justified.
 37. On the issue as to whether the Respondent is liable to refund Kshs. 166,700, I find that the answer is in the negative.
 38. I find that the funds were not documented as a loan or joint investment. The Respondent’s assertion that the money was a “token of appreciation” for their relationship remains plausible, especially given the lack of written agreements or independent witnesses.
 39. The Courts distinguish between gifts (irrecoverable) and loans/business contributions (recoverable). The Appellant failed to demonstrate that the money was advanced as capital rather than a gift (see *Kibutiri v Kibutiri* [1982] KLR).
 40. I find that the Respondent is not liable to refund the amount, as the Appellant did not prove it was a recoverable business contribution.
 41. The appeal is dismissed in its entirety and the judgment of the trial court (Taveta PMCC No. E003 of 2023) delivered on 11/7/2024 is upheld.
 42. The respondent having acknowledged that she benefited from the transaction is not entitled to costs of the appeal.
 43. Each party to bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT VOI THIS 16TH DAY OF MAY, 2025.

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A. N. ONGERI

JUDGE

In the presence of:

Court Assistants: Maina/Millicent

..... for the Appellant

..... for the Respondent

