



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimanthi v Kiteme (Civil Appeal 64 of 2019)  
[2024] KEHC 2202 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2202 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL 64 OF 2019**

**RK LIMO, J**

**MARCH 4, 2024**

**BETWEEN**

**IRENE KATUMBU KIMANTHI ..... APPELLANT**

**AND**

**VERONICA KITEME ..... RESPONDENT**

*(Appeal from the judgement of Hon. S. Mbungi (Chief Magistrate) delivered on 15th October, 2019 vide Kitui Chief Magistrates' Court Civil Case No. 350 of 2017)*

**JUDGMENT**

1. This Appeal arose from the judgement of Hon. S. Mbungi (Chief Magistrate) delivered on 15<sup>th</sup> October, 2019 vide Kitui Chief Magistrates' Court Civil Case No 350 of 2017.
2. In that suit, the Appellant had sued the Respondent for Kshs 203,650.75/= which claim arose from breach of contract. She alleged that she lent the Respondent some unspecified amount which she pleaded the Respondent wanted in order to pay for a civil debt for which she had seen her sent to civil jail.
3. The Respondent on her part denied the Appellant's claim and admitted owing her only Kshs 113,250/= which she claimed she had fully paid.
4. The evidence in the trial court was to the effect that the appellant and the respondent were colleagues both working at Kitui School for the deaf. The appellant, (PW1) told the court that she accompanied the respondent's brother and sister to Kitui G.K Prison on 19<sup>th</sup> May 2017 where they had gone to visit the respondent who had been committed to civil jail. That while there, the respondent asked the appellant to settle her civil debt but the appellant informed her that she could not raise the amount which she stated was over Kshs 100,000/=. The appellant proceeded that she agreed to assist the respondent by securing the amount through her SACCO and that the respondent agreed to settle SACCO loan upon her release. In her own words, the appellant stated that the Respondent was



committed for a debt of Kshs 113,250/= but due to the urgency of the situation, the Respondent topped up her existing loan of Kshs 430,000/= at the SACCO to Kshs 870,000/= with an interest of 1.5%. She proceeded that she gave the respondent's brother Kshs 113,250/= to facilitate her release from prison. She stated that the two signed an agreement a month after the respondent was released from prison. The appellant stated that her claim in court was for the interest that her loan had accrued at her SACCO. She produced the following documents, a copy of loan application form tendered as P exhibit 1, copy of the agreement marked as P exhibit 2 and a letter marked as P exhibit 3.

5. She assessed her claim to be Kshs 203,650.00 with interests.
6. PW2 Paul M. Kitheka adopted his witness statement dated 13<sup>th</sup> March, 2018 and stated that he was present when the appellant went to visit the respondent at G.K Kitui prison on 19<sup>th</sup> May, 2017 and that he heard the respondent requesting the appellant to bail her out.

In sum the Respondent's case was that she settled her debt in full and owed the Appellant nothing.

7. The trial court evaluated the evidence tendered and found that the Appellant's case had not been proved the required standard and found the Respondent's version of the case to be more credible given the evidence tendered in that court. The Respondent was however not awarded costs.
8. The Appellant felt aggrieved of the lower court's decisions and preferred this appeal raising the following grounds namely;
  - i. The Learned Magistrate erred in law and fact by failing to correctly uphold and apply the Plaintiff's uncontroverted evidence and unrebutted testimony regarding the circumstances under which upon the Defendant's request and undertaking to fully repay the loan she applied for and obtained solely and exclusively for purposes of enabling the Defendant utilize all the loan proceed to secure her release from civil jail advancement of the money to the Defendant and the Defendant's undertaking and Agreement to repay.
  - ii. The Learned Magistrate erred in law and fact by failing to correctly uphold and apply the Plaintiff's uncontroverted evidence and unrebutted testimony regarding the advancement of the money to the Defendant and the Defendant's unequivocal and unqualified undertaking and agreement to repay.
  - iii. The Learned Magistrate erred in law and fact by failing to correctly uphold and find that the Defendant in her pleadings and witness statements had admitted to receiving the loan from the Plaintiff but sought to recant the admission in her evidence.
  - iv. The Learned Magistrate erred in law and in fact by finding in favour of the Defendant's conflicting and contradictory statements, pleadings and testimony to override the Plaintiff and her witnesses evidence which was corroborated and unsupported by documentation.

9. The Appellant in her brief submissions insists that she advanced a friendly loan to the Respondent after taking a loan herself. She argues that though the Respondent repaid the amount advanced, she failed to repay the interests which her loan from a Sacco attracted. She submits that she took a loan from her Sacco solely to bail out her friend (the Respondent herein) and therefore she should be responsible for the interests of which the loan attracted.



10. The Respondent on the other hand submits that the Appellant loaned her Kshs 93,250/= with an agreed interests of 20,000/= totaling Kshs 113,250/= which she claims she paid in full.
11. This court has considered this appeal and the response made.
12. This is a first appeal and my role as a first appellate court is to re-evaluate the evidence tendered at the trial with a view to making own conclusions.
13. This appeal relates to another Appeal No 61 of 2019 where the Respondent was appealing against the failure by the trial court to award her costs. The counsels on record in both appeals should really have combined the two (2) appeals with a view to saving on court's time and costs. But having said that, what is before me is whether or not the trial court properly evaluated the evidence placed before it.
14. It is undisputed fact that the Appellant herein lent the Respondent Kshs 113,250.00 because both parties agreed on that figure. The only departure is that while the Appellant claims that Kshs 113,250.00 was the principal amount, the Respondent claims that the amount was all inclusive of interests.
15. It is also an undisputed fact that the respondent was held in custody at Kitui G.K prison for a civil debt. It is also not a disputed fact that the appellant went to visit the respondent at the prison, consequently, the appellant ended up giving the respondent money to settle the civil debt and secured her release from prison. That fact is acknowledged by the appellant in the Plaint dated 29th September 2017. The two reduced their agreement in writing which agreement was tendered in evidence. The said agreement indicated that the appellant had advanced Kshs 113,250/= to the Respondent. The two parties annexed the said agreement in their pleadings.
16. This court has perused through the agreement dated 21<sup>st</sup> June, 2017 and the amount in issue stated to be Kshs 113,250/= and the terms of the agreement was that the amount was paid on 14<sup>th</sup> June, 2017 and was to be repaid on 30<sup>th</sup> June, 2017. The terms alleged by the Appellant specifically in regard to the interests accrued to a third party (Sacco) is not captured. The Appellant contends that he same was captured through a verbal agreement but as correctly found by the trial court, a verbal agreement cannot override a written agreement.
17. It is also clear that the respondent repaid the amount agreed upon in full. The appellant's own testimony during cross examination was as follows; "the agreement is dated 22/6/2017. The defendant acknowledged having received Kshs 113,250/-. She was to pay on 30/6/2017. As per agreement she paid Kshs 75,000/- on 1/9/2017 and balance she paid end of September 2017. The other terms of the agreement were discussed verbally on 13/5/2017 when I applied for the loan." The allegation that the respondent agreed to cater for the costs of processing the loan as well as interest chargeable remained unproved and as the trial court found, an afterthought.
18. It is trite law in evidence that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that:

"However desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
19. The burden of proof lay on the Appellant and from the evidence tendered at the lower court that burden was not discharged. It boiled down to her words against the Respondent's and in light of the written agreement and the Appellant's own acknowledgment that the Respondent repaid Kshs 113,250/= to her, her claim for further interests simply could not be sustained in law.



20. The trial magistrate evaluated the evidence correctly and reached the correct conclusion. In the premises, this court finds no merit in this appeal. The same is disallowed with costs to the Respondents. As observed above had the parties consolidated the two (2) appeals perhaps costs would have been avoided but that is now water under the bridge.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 4<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. JUSTICE R. LIMO - JUDGE**

