



**Waruguru v Nyanjau (Civil Appeal 67 of 2022)
[2024] KEHC 8065 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 67 OF 2022**

MA ODERO, J

JULY 4, 2024

BETWEEN

SHELMITH WARUGURU APPELLANT

AND

CHARITY NYANJAU RESPONDENT

JUDGMENT

1. Before this court is the Memorandum of Appeal dated 25th November, 2022 by which the Appellant Shelmith Waruguru Gakuru challenges the judgment delivered by Hon E. M. Gaithuma on 14th November, 2022.
2. The Respondent Charity Nyanjau opposed the appeal.
3. The Appeal was canvassed by way of written submissions.
4. The Appellant filed the written submissions dated 13th May, 2024 whilst the Respondent relied upon her written submissions dated 29th April, 2024.

Background

5. The Appellant filed in the lower court a statement of claim dated 14th September, 2022 seeking the following orders:-
 - “(a) Judgment in the sum of Kshs. 15,000/=
 - (b) Costs of the claim.
 - (c) Interest
 - (d) Any other appropriate relief.”



6. The Respondent opposed the claim through her Defence dated 25th October, 2022. The claimant then filed a Reply to Defence and counterclaim dated 1st November, 2022.
7. The claimant alleged that she had advanced to the Respondent a loan of Kshs. 15,000/= which was to be repaid within one month with interest. That the Respondent never paid back the money.
8. On her part the Respondent concedes that the claimant did advance to her a sum of Kshs. 15,000/= . However the Respondent asserts that she refunded the claimant an amount of Kshs. 2,500/= thus what is owing is only Kshs. 12,500 which she is ready and willing to pay.
9. The Respondent further claims that the claimant came to her home and took away the Respondents TV set valued at Kshs. 20,000/= in lieu of the unpaid debt. The Respondent counterclaims for the value of the TV set.
10. The matter was heard inter parties and on 14th November, 2022 the learned trial magistrate delivered her judgment in the following terms;-
 - “(a) Judgment is entered in favour of the claimant against the Respondent in the sum of Kshs. 15,000/=.
 - (b) The counterclaim has been proved. Judgment is entered in favour of the respondent as against the plaintiff in the sum of Kshs. 20,000/=.
 - (c) Costs be in the cause.”
11. Being aggrieved by this judgment the Appellant filed the present Memorandum of Appeal which is premised on the following grounds;-
 - “(a) The learned magistrate erred in law in upholding the respondents claim that the claimant and/or her agents stole a Television set from the respondent’s house in the absence of adequate proof and of police report.
 - (b) The Honourable magistrate erred in law on upholding that there was a Television set valued at Kshs. 20,000 belonging to the respondent without prior adequate proof.
 - (c) That the Honourable magistrate erred in law holding that the television was stolen from the respondent in a small claim court case which theft is purely a criminal case.”

Analysis And Determination

12. I have carefully considered the record of the trial before the lower court as well as written submissions filed by both parties.
13. This is a first appeal thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and draw its own conclusions.
14. In *Selle & another -vs- Associated Motor Boat Company Limited others* [1968] E.A 123, the court of Appeal held that;-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it



should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”

15. Similarly the same court in the case of *Kiruga -vs- Kiruga & Another* [1958] KLR eKLR the court observed that

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.”

16. Regarding the debt owed by the Respondent to the claimant there is not any doubt. The Respondent readily admitted to having received the money from the claimant. Under cross-examination the Respondent states;-

“I admit Shelmith gave me money Kshs. 15,000/= and I was to pay with interest.....”

17. This is a clear and unequivocal admission by the Respondent that indeed an amount of Kshs. 15,000 was advanced to her by the claimant.

18. However the Respondent goes on to assert that she refunded to the claimant a sum of Kshs. 2,500 and therefore only admits to owing Kshs. 12,500.

19. I do agree with the Hon trial magistrate that the burden of proving that she had refunded this amount of Kshs. 2,500 lay on the Respondent. He who alleges, it is said must prove.

20. There was no evidence tendered by the Respondent to prove that she had ever refunded Kshs. 2,500 to the claimant. The claimant categorically denies that the Respondent refunded to her any portion of the loan which had been advanced.

21. No document signed by the claimant confirming receipt of the money Was presented in court. There was no witness who saw the Respondent refund this Kshs. 2,500.

22. In the absence of any documentary and/or other proof that the Respondent refunded an amount of Kshs. 2,500 to the claimant, the court rejects this contention and finds that the amount due and owing to the claimant is Kshs. 15,000.

23. The Respondent on her part accused the claimant of having come to her home together with a man and two women and having taken away the Respondents TV set ostensibly to satisfy the debt owed. The evidence of the Respondent in this regard was supported by her child M. N who was at home when the incident occurred.

24. The learned trial magistrate on this counter-claim found in favour of the Respondent and awarded her the sum of Kshs. 20,000.

25. Firstly there was no evidence tendered in the lower court to prove that the Respondent owned a Tv set or that if she did the value of the said Tv set was Kshs. 20,000. The Respondent claimed to have purchased the Tv set for Kshs. 20,000 but no evidence e.g a receipt or invoice was produced to prove this fact.



26. Further even if the court were to accept that the Respondent had in her house a Tv set purchased at Kshs. 20,000, there is no evidence to show how long the Respondent had owned said Tv set. A Tv is a deteriorating asset which loses value the longer it is used. Was the Tv set in the Respondents house brand new - the court was not told.
27. Secondly if as the Respondent claims the claimant stormed into her house and took away a Tv set then this would amount to Theft. The Respondent ought to have reported the matter to police for action. In my view the trial court lacked jurisdiction to consider this allegation of theft under a Civil Claim.
28. Based therefore on the foregoing I allow this appeal and uphold the judgment delivered on 14th November, 2023, only in regard to judgment being entered in favour of the claimant/Appellant in the amount of Kshs. 15,000.
29. The portion of the judgment allowing the Respondents counter-claim for Kshs. 20,000 is hereby set aside.
30. Costs of appeal are awarded to the Appellant.

DATED IN NYERI THIS 4TH DAY OF JULY, 2024.

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MAUREEN A. ODERO

JUDGE

