



**Olela v Ochieng (Civil Appeal E029 of 2023)
[2024] KEHC 12045 (KLR) (Civ) (7 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E029 OF 2023

JM NANG'EA, J

OCTOBER 7, 2024

BETWEEN

CAROL OLELA APPELLANT

AND

JOYCE ANYANGO OCHIENG RESPONDENT

*(Being an appeal from the Judgement of the Chief Magistrate's Court at Milimani
(Hon. A.N Makau- PM) delivered on 20th December 2022 in CMCC NO. 978 OF 2019)*

JUDGMENT

The pleadings in the lower Court

1. The appellant herein is challenging the said learned trial court's decision in which it dismissed her claim against the respondent for a total of Kshs 3,200,000 plus the costs of the suit and interest at court rates. The appellant sued the respondent in the lower court for judgement in the said sum contending that she had transmitted Kshs 2,200,000 to the latter in tranches as her capital contribution to a joint business venture. According to the appellant, it was agreed that she would be paid Kshs 1,000,000 or an equal share of accrued profit, whichever was greater, as consideration for her investment. The appellant further averred that it was a term of the agreement that her said share contribution together with the profit would be paid back within 6 months of the date of the agreement. The respondent is, however, said to have repaid a sum of Kshs 300,000 only thus provoking the suit.
2. The respondent filed defence and also put up a counterclaim. She traversed the appellant's claim contending that it was in fact the appellant who had borrowed Kshs 2,200,000 from her in January 2016 promising to repay the debt with interest of Kshs 500,000 after a year. The respondent denied having made the alleged repayment of Kshs 300,000 explaining that the amount was another advance



she made to the appellant at her request. The appellant is therefore accused of not being forthright and the court was urged to dismiss the claim with costs.

3. By her counterclaim, the respondent alleges that sometime in January 2016 she entered into a friendly agreement with the appellant by which she lent her Kshs 2,025,000 on the understanding that the latter would refund a total of Kshs 2,525,000. The loan was remitted to the appellant in cash through 5 equal instalments of Kshs 405,000. The appellant did not make refund within the agreed period but upon the respondent's complaint she repaid a total of Kshs 2,200,000 between 25th April 2017 and 23rd May 2017 remaining with a balance equivalent to the agreed interest on the loan.
4. The respondent further averred that in July 2018 the appellant requested for and was given more credit in the sum of Kshs 700,000 out of which 2 instalments of Kshs 300,000 and Kshs 100,000 were deposited into the latter's bank account. Kshs 300,000, was said to have been given to the appellant in cash.
5. The respondent laments that the appellant failed to repay the sum of Kshs 700,000 together with a sum of Kshs 500,000 being agreed interest on the earlier advancement of Kshs 2,025,000. The respondent claimed the total sum of Kshs 1,200,000, the costs of the suit, interest and any other relief the court deemed apt to grant.

The evidence before the lower Court.

6. Adopting her witness statement dated 20th March 2019 as her testimony, the appellant reiterated the averments in the suit by her oral evidence before the trial court. She stated that the defendant had approached her to help finance a project for tarmacking of Shibale Bus Park Phase II in Mumias West Sub-County in Kakamega County for which she had successfully tendered. She agreed to lend her the money in question on the terms stated. To corroborate the oral evidence, she tendered her bundle of documents contained in a list dated 20th March 2019 forming part of the record of this appeal. The documents are a letter dated 27th February 2019 demanding repayment of the alleged debt; bank deposit slips ostensibly showing various cash deposits totalling Kshs 2,200,000 into the respondent's bank account and bank account statements purportedly evidencing refund of Kshs 300,000 by the respondent. There is a further list of the appellant's documents dated 24th November 2020 that includes a letter dated 10th March 2017 by which the respondent was allegedly informed by the County Government of Kakamega through her company (Joyrowl Limited) about the construction tender she had won. A supplementary list of documents dated 26th October 2021 consisting of a bank statement in respect of the respondent's account No 011090XXXXXXXXX with Co-operative bank for the period between 1st July 2018 and 31st December 2018 showing various cash deposits was also exhibited in the lower court. So was a certificate dated 19th April 2022 issued by the appellant to the effect that she exchanged mobile phone texts with the respondent via the popular whatsapp application over the credit allegedly advanced to the latter. One of the texts purportedly from the respondent to the appellant pledges; "I'll pay you when I get money". The appellant therefore refuted the respondent's claim that she was the one who lent her money.
7. According to the appellant, the refund of Kshs 300,000 was deposited into her account without notice to her, prompting her to amend her plaint to reflect the payment among other reasons. The appellant conceded that one of the exhibited banking slips is dated 25th April 2017 yet the agreement was entered into in May 2017. She, however, appeared to explain that they had started discussing the business deal earlier and she gave some of the money to the respondent at her request.



8. The respondent also testified and underscored the contents of her defence to the suit and the counterclaim. She did not tender any documentary exhibits and maintains that it is the appellant who owes her as claimed as she admits to receiving cash deposits into her bank account.

The basis of the trial court’s decision

9. In dismissing both the main suit and the counterclaim, the learned trial magistrate found that none of the parties complied with the law on production of documentary evidence and that they did not present material evidence in support of their respective cases. According to the trial magistrate, it is the word of one party against the other with none discharging the legal burden and standard of proof.

Grounds of Appeal

10. The appellants’ Grounds of Appeal as per Memorandum of Appeal dated 12th January 2023 may be condensed as hereunder:
- a. That the learned trial magistrate erred in law and fact by finding that the appellant had not complied with the law relating to production of documentary evidence and/or did not offer material supporting evidence.
And
 - b. That the learned trial magistrate erred in law and fact by dismissing the appellant’s suit against the weight of evidence.
11. The appellant therefore prays inter alia that the appeal be allowed and the trial court’s judgement dated 20th December 2022 be set aside with costs.

Guiding legal Principles

12. It is trite law that the appellate court can only interfere with the findings and /or award of the trial court if the court misdirects itself on matters of fact and /or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd v Oakdale Commodities Ltd* (1997) eKLR Civil Appeal No 198 of 1995). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle v Associated Motor Boat Co.* (1968) EA 123. The Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:
- “i. i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”



Analysis and Determination

13. Learned Counsel for the parties filed written submissions with the appellant's advocates choosing to fully rely on their submissions in the lower court which form part of the record. The appellant's argument is that the respondent admitted the debt particularly vide the text message alluded to hereinabove in which it is claimed that she promised to pay the appellant. The respondent's rejoinder is that the whatsapp texts relied upon are not credible for non-compliance with the provisions of sections 78A and 106 B of the Evidence Act. The court is told that contrary to these statutory provisions, the mobile phone purportedly used to record the conversations and the manner in which the electronic evidence was produced are not sufficiently described in the relevant certificate the appellant tendered. The respondent also takes issue with the appellant's failure to call the makers of some of the documentary exhibits she produced which the respondent says violated section 35 (b) of the Evidence Act. One of the exhibits mentioned in this regard is the letter dated 10th March 2017 purportedly authored by one Joel Wamalwa conveying the information that the respondent's company had won the above stated tender.
14. Section 78A of the Evidence Act relates to admissibility of electronic and digital evidence. Subsection (1) provides that "in any legal proceedings, electronic messages and digital material shall be admissible as evidence." Subsection (3) states;
- "In estimating the weight, if any, to be attached to electronic and digital evidence under subsection (1), regard shall be had to –
- a. the reliability of the manner in which the electronic and digital evidence was generated, stored, or communicated;
 - b. the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - c. the manner in which the originator of the electronic and digital evidence was identified;
 - d. any other relevant factor."
15. Section 106 B governs admissibility of electronic records. Subsection (4) stipulates that;
- "in any proceedings where it is desired to give a statement by virtue of this section, a certificate doing any of the following-
- a. identifying the electronic record containing the statement and describing the manner in which it was produced;
 - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - c. dealing with any matters to which subsection (2) relates; and
 - d. purporting to be signed by a person occupying a responsible position, in relation to the operation of the relevant device shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be



sufficient for a matter to be stated to the best of the knowledge of the person stating it.”

16. Subsection (2) states conditions that must be met before information contained in an electronic record printed on paper, stored, recorded, or copied on optical electro-magnetic media produced by a computer can be deemed to be a document for admission in evidence without proof or production of the original or in place of direct evidence. The conditions are-
 - a. the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out during that period by a person having lawful control over the use of the computer.;
 - b. during the said period information in question was regularly fed into the computer in the ordinary course of the said activities;
 - c. throughout the material part of the period, the computer was operating properly or, if not, then in respect of the period it was not operating properly, or was out of operation during that part of the period, was not such as to affect the electronic record or accuracy thereof; and
 - d. the information contained in the electronic record reproduces or is derived from information fed into the computer in the ordinary course of the said activities.
17. Section 35(b) of the *Evidence Act* requires the maker of a document to produce it in court “unless the maker is dead, or cannot be found or is incapable of giving evidence or if his attendance cannot be procured without an amount of delay and expense which in the circumstances of the case appears to the court unreasonable.”
18. On 18th July 2022 during hearing of the suit in the lower court, Counsel for the respondent objected to production of the said whatsapp messages and a copy of the aforesaid letter dated 10th March 2017 for non-compliance with the above stated statutory provisions. Regarding the whatsapp messages it was contended that the appellant’s certificate explaining the process leading to extraction of the messages only indicates the phone used as a Samsung S6 without giving “details of the phone”. The letter dated 10th March 2017 was objected to for the reason that it is a copy.
19. After hearing the parties’ arguments over the documents, the trial court allowed the documents to be exhibited promising to give its opinion thereon during final determination of the case. As noted earlier in this judgement the learned trial magistrate eventually found that none of the parties complied with the law on production of documentary evidence. Unfortunately, the lower court did not give reasons for its opinion.
20. A perusal of the appellant’s certificate dated 19th April 2022 issued pursuant to section 106 B of the *Evidence Act* identifies the cell phone used to receive and extract the said whatsapp messages as a “Samsung S6”. The printer used is described as “RICOH MP C4503”. The devices are said to have been in proper working condition during the period the activities were undertaken. It is unclear what other details the respondent wanted the appellant to supply as no questions appear to have been put to her on cross-examination in a bid to discredit her evidence regarding the certificate. In her evidence, the respondent did not also rebut the appellant’s evidence on the information in the certificate. I therefore agree with the appellant that the certificate sufficiently complies with section 106 B of the *Evidence Act*. The text messages in question, particularly one by which the respondent purportedly promised the appellant; “I will pay when I get money”, cannot therefore be impugned as not authentic.
21. The letter dated 10th March 2017 the respondent also objected to as inadmissible is a copy. This is secondary evidence which under sections 66 (b) and 68 (1) (a) (i) of the *Evidence Act* may be given of



the existence, condition, or contents of a document where the original is shown to be in possession or power of the person against whom it is sought to be proven. Before admission of the copy, however, reasonable notice to produce the original has to be given to the adverse party or to his advocate as required by section 69 of the Act. The record does not show that the requisite notice was given to the respondent and was not complied with. To this extent the letter was wrongly admitted as evidence in the lower court.

22. Clearly, the lower court is to be faulted for the manner in which it treated the respondent's objection to the two documents. The learned trial magistrate ought to have given a reasoned ruling as to whether or not the documents were admissible during the hearing when the objection was raised and not defer the decision to the time of delivery of final judgement. Even then, the court did not finally give reasons for its view that the parties' documentary exhibits were non-compliant with the law. To enable proper case management as envisaged under Order 11 of the *Civil Procedure Rules 2010*, the parties should also have intimated any objection to production of documents at the Pre-trial Conferences stage to avoid surprises at the hearing.
23. In light of the court's findings, Ground (a) of the appeal partly succeeds. To determine Ground (b), the court will establish whether the appellant proved her claim in the lower court on a balance of probability. The appellant relies on the case of *Eastern Produce (K) Limited - Chemomi Tea Estate v Bonface Shoya* (2018) eKLR in which it was observed that "when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability is more probable than the other."
24. The respondent's advocates submit that this is a case of the word of one party against that of another and therefore the appellant cannot be said to have satisfied the legal standard of proof on a balance of probability. I was referred to the judicial determination in *Patrick Peter Kithini v Justus Mwangela* (2020) eKLR where one party claimed to have lent another money remitted through the popular money transfer service known as M-pesa. The court held that "an M-pesa transaction or any other transaction for that matter without further evidence clarifying the basis of the transaction is insufficient to prove a fact on a balance of probability particularly where a recipient gives adequate or satisfactory explanation as to why the money was deposited in his account."

Determination

25. This court is satisfied that the appellant proved her case before the lower court on a balance of probability. The case of Patrick Peter Kithini supra is clearly distinguishable given the appellant's un rebutted electronic evidence herein indicating that the debt in issue was admitted. Both grounds of appeal as set out therefore succeed.
26. In the result, the appeal is allowed with costs. Consequently the trial court's judgement dated 20th December 2022 dismissing the suit is set aside and substituted with judgement for the appellant in the sum of Kshs 3,200,000 together with the costs of the suit and interest thereon at court rates. The appellant will also have the costs of the appeal.
27. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 7TH DAY OF OCTOBER, 2024 IN THE PRESENCE OF :

The Appellant's Advocate, Mr. Chasia

The Respondent's Advocate, Mr. Okach

The Court Assistant, Amina



J. M. NANG'EA, JUDGE.

