



REPUBLIC OF KENYA



KENYA LAW
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**Masila v Warinwa (Civil Appeal E009 of 2023)
[2024] KEHC 15786 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E009 OF 2023
AN ONGERI, J
DECEMBER 13, 2024**

BETWEEN

NICODEMUS MASILA APPLICANT

AND

FIESTA ACHAYO WARINWA RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. T. N. Sinkiyian
(PM) in Voi CMCC No. E071 of 2021 delivered on 6th March 2023)*

JUDGMENT

1. This is an appeal from the judgment delivered on 6th March 2023 in Voi CMCC No. E071 of 2021.
2. The Respondent sued the Appellant for refund of Kshs. 229,380/= which the Respondent had lent to him.
3. The trial court found that the Appellant paid part of the money but did not produce evidence that two other persons, Latifah and Kenneth sent payments on his behalf and also how much they paid.
4. The trial court found that the Appellant failed to call the two as witnesses. Further that the Appellant failed to plead the said issue and denied the Respondent a chance to adduce evidence to counter the same.
5. The Appellant has appeal on the following grounds:
 - i. That the learned Magistrate erred in law and in fact by deciding that the Respondent proved her case on a balance of probabilities thus allowing the same.
 - ii. That the learned magistrate erred in law and in fact by failing to consider that the testimony of the Appellant was on oath and the same was tested by way of cross examination by the Respondents advocates.



- iii. That the learned Magistrate erred in law and in fact by deciding that the Respondents failing to respond to vital issues raised in the defense she denied the same.
 - iv. That the trial Magistrate erred in law and in fact by deciding that the Appellant failed to substantiate how he paid Kshs. 200,000/= to the Respondent.
 - v. That the trial Magistrate erred in law and in fact by deciding that the Appellant failed to call witnesses to prove the bank deposits were made by proxies yet on the other hand the Respondent had acknowledged the same payments were made by the Respondent.
 - vi. That the trial magistrate erred in law and in fact by failing to appreciate the Mpesa statements that were supplied by the Appellant as evidence has transactions which were missing in the Respondent's Mpesa Statement.
 - vii. That the trial Magistrate erred in law and in fact by failing to consider the appellant's submissions and the authorities cited therein.
6. The parties filed written submissions as follows:- the appellant submitted that the appellant in his testimony stated that he had paid Kshs. 200,000 of the money he owed the respondent but the trial court failed to consider the evidence. The appellant argued that his evidence was consistent from the 1st day he was served with a demand letter that he returned Kshs. 200,000 to the respondent and that the testimony of the appellant was sufficient since it was scrutinized by the respondent's advocate through cross examination.
 7. The appellant submitted that the decision of the trial court was based on insufficient evidence as it was solely based on the respondents' failure to reply the defense and that such failure meant that the respondent had denied the facts with sufficient backing of the law.
 8. The appellant submitted that the trial court did not consider the relationship between the appellant and the respondent. The relationship was purely vertical as they both worked in the same organization and the appellant was the respondent's personal driver. That therefore the trial court should have considered this in determining whether the appellant paid Kshs. 200,000 to the respondent in cash while in her home.
 9. The appellant argued that the acknowledgement by the respondents of the fact that the payments made by appellants proxies is sufficient evidence to establish the fact that the said payments were made on behalf of the appellant. there was hence no need to call upon other witnesses as the respondent had not raised an objection on the matter.
 10. The appellant submitted that the respondent filed a claim against the appellant. she attached Mpesa Statement in support of her case. The respondent in turn also filed an mpesa statement which had some transactions which were missing in the respondent's mpesa statement. This was crucial evidence that the trial court decided to ignore and it could be inferred that the respondent was hiding something. This further raised questions on the accuracy and completeness of the evidence that was presented in court by the respondent.
 11. The respondent conversely submitted that the appellants appeal mainly consists of issues that have already been determined and no new information was tabled and is thus res judicata. The respondent relied on the case of W.K. Muigai & 4 Others -v- Philomena Ndanga Karanja [2014] eKLR where Justice F. Gikonyo in his ruling as to whether a draft defence had merit stated;

“...The Plaintiff's produced documents which the defendant does not really controvert. The plaintiff's case has been anchored on evidence and it is indefensible for the defendant to



state that the Plaintiff's case is baseless... I see an attempt by the defendant to try and inflate trivial and subordinate issues in the hope that they will pass for triable issues. ...Further, the fact that the defendant sold a property that she was well aware and been sold to a third party is not conduct that is attractive to equity. These things roll back the magnanimous hands of equity with which the court grants favour on the defendant. Once that happens, the Applicant does not excite the discretionary remedy on her side. Even when I consider the other condition of prejudice, the scale tilts against the defendant because. If I were to set aside the judgment herein, I will be allowing the defendant to set up a defence which is not merited against the plaintiff's claims, and that will be an outright prejudice to the plaintiff's. See the case of Kinyanjui & Another -vs- Thande & Another (1995 - 98 2 E.A 159; where the Court of Appeal, although in an application to strike out the defence stated that "... defences which are a sham can only tend to prejudice, embarrass or delay the trial of the action."

12. The respondent submitted that the appellant was accorded a fair hearing and failed to convince the court that he truly did settle the respondent's claim of Kshs. 229,380. It was the respondent's position therefore that the appeal herein is a delay tactic meant to shield him from paying the total amount he owes.
13. This being a first appeal the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the findings of the trial court.
14. The issues for determination are as follows:-
 - i. Whether the Respondent proved her case to the required standard.
 - ii. Whether the Appellant proved that he repaid all the money.
 - iii. Who pays the costs of this suit.
15. On the issue as to whether the Respondent proved her case the trial court found that there is evidence that the Respondent lent the Appellant Kshs. 800,000/=.
16. The trial court found evidence that the money was repaid with the first instalment paid in 7th December 2016 of Kshs. 30,000/=.
17. Thereafter the Appellant continued paying but not in accordance with the agreement until April 2020 when the Appellant stopped paying leaving a balance of Kshs. 229,380/=.
18. The Respondent reported the matter to Muthangari Police Station before filing this suit.
19. I find that the Appellant's defence that the Respondent agreed to give him the money and started pursuing him with sexual advances was found to be untrue.
20. The Appellant failed to prove that Respondent agreed to give him the money to help him out and that the same was not to be given back.
21. I find that there is no evidence that the Appellant repaid all the money.
22. The trial court was right in holding that the Appellant owes the Respondent Kshs. 229,380/=
23. The Respondent did not produce evidence that he overpaid the debt as alleged.
24. I dismiss the appeal with costs to the Respondent.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF DECEMBER 2024 IN OPEN COURT AT VOI.



ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Maina/Trizah

