



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NUMBER 50 OF 2019

PATRICK PETER KITHINIAPPELLANT

VERSUS

JUSTUS MWONGELA.....RESPONDENT

(From the Original Kitui Chief Magistrate's Civil Suit No.60 of 2019 being an appeal from the Judgment of Hon.M.Kimani –Resident Magistrate delivered on 8th August, 2019)

J U D G M E N T

1. This is an appeal against the decision made on 8th August 2019 by Hon.M.Kimani *vide* **Kitui CM's Civil Suit No.60 of 2019**. In that suit, the **Appellant, Patrick Peter Kithikii** had sued the **Respondent** herein **Justus Mwangela**, for breach of an agreement to refund Ksh.78,000/=reportedly advanced to him by the **Appellant** to enable him pay some school fees. The **Respondent** denied the **Appellant's** claim and stated that the money deposited in his account totaling Ksh.63,000/= was refunded to the **Appellant** in cash by him.
2. The trial court upon evaluating the evidence tendered before her found that the **Appellant's** case had not been proved to the required standard as his case only rested on his word as against that of the **Respondent**.
3. The **Appellant** felt aggrieved by the finding of trial court and lodged this appeal raising the following grounds namely:-
 - i. That the Learned Magistrate erred in Law and in fact by holding that since there exists no written agreement there could not have been a loan advanced by the plaintiff to the defendant despite proof of Mpesa transaction.*
 - ii. That the Learned Magistrate erred in Law and in fact by holding that even after the defendant admitted receiving the loan amount of Ksh.63,000 it could not account for a loan.*
 - iii. That the Learned Magistrate erred in Law and in fact by failing to acknowledge that there was no proof that the Defendant had paid back the money lent to him by the Plaintiff vide Mpesa transaction No LBC3232JPPC5 on 12.2.2017.*
 - iv. That the Learned Magistrate erred in Law and in fact by finding that lack of a written contact or agreement means that there was no contract despite the fact that the Plaintiff had furnished court with proof of advance of money to the defendant.*
 - v. That the Learned Magistrate erred in fact and in Law in misconstruing the provisions of the constitution and rules of natural justice which should be applied across the board and should have considered the appellant's submissions that the respondent had received the loan amount of Ksh.63,000 by Mpesa and that as the one aggrieved one who approached court for redress should have given a favorable judgment.*
 - vi. That the Learned Magistrate erred in Law and in fact by failing to find that the evidence adduced in court both orally and in writing by Plaintiff/Appellant is sufficient proof of loan advanced to the Defendant/Respondent.*
 - vii. That the Learned Magistrate erred in Law and in fact by failing to consider the Plaintiff/Appellant had incurred costs in pursuing a refund of the loan amount and also with legal fees incurred.*
 - viii. That the Learned Magistrate erred in Law and in fact to make finding on all issues raised by the Plaintiff/Appellant in his submissions and pleadings.*
 - ix. That the Learned Magistrate erred in Law in failing to uphold rules of procedure over substantive rights of the parties.*

4. The **Appellant** in his written submissions through counsel submits that the **Respondent** filed a defense denying every allegation made by the **Appellant** at the lower court but failed to file any document to support his defence. The **Appellant** faults the trial Magistrate for failing to note that the **Respondent** had no solid defence and that he had departed from his pleadings showing that he was unreliable.
5. He contends that on his part he proved his case by way of oral evidence and documentary evidence that showed that he deposited Ksh.63,000/= via Mpesa. In his view that fact alone shifted the burden to the **Respondent** on a balance of probability. He faults the trial court for not finding that the defence put forward was a mere denial. He relies on the decision in **Kanji Jadua Valji –Versus- Trinity Prime Investment Ltd. & two others [2014] eKLR**.
6. The **Appellant** further submits that it is trite law that whoever alleges must prove. He contends that he proved his case and faults the trial court for making a contrary finding merely because there was no written agreement tendered.
7. The **Respondent** on the other hand has opposed this appeal through brief written submissions made in person. He contends that the statement of Mpesa transaction tendered without written agreement or witnesses was insufficient to prove that he owed the **Appellant** Ksh.63,000/=. He denies admitting that he owed the **Appellant** the said amount.
8. He further contends that he never applied or asked for a loan from the **Appellant** and there was no document to show that he had taken a loan from him.
9. This court has considered this appeal and the response made. In my considered view the only issue for determination is whether the **Appellant** proved his case to the required standard that he had lend Ksh.63,000/= to the **Respondent**.
10. The evidence tendered at the lower court going by the court proceedings indicates that the Appellant tendered evidence showing that he sent Ksh.63,000/- via mobile money transfer through Safaricom's MPESA transaction. The **Appellant** testified that the **Respondent** asked for the money because he wanted to pay fees for his children in secondary school and University. He tendered a statement from Safaricom (P.ex.2) showing among other transaction a deposit of Ksh.63,000/= on the **Respondent's** mobile number on 17th February, 2017.
11. The **Respondent** in his defence conceded receiving the amount but added a twist that he actually gave Ksh.62,000/= in cash to the **Appellant** who then refunded the same electronically via MPESA, to him.
12. It is apparent going through the proceedings from the trial court that there was nothing written in any of the alleged transactions. The Appellant simply testified that he was assisting a friend in need and that save him the money in order to help him pay school fees for his children. On the other hand the **Respondent** testified that he was also helping a friend and claimed that he gave him 62,000/= to help him purchase same plot and that the **Appellant** refunded the amount electronically.
13. The trial court in my view evaluated the evidence tendered before her well and concluded that in the absence of any agreement, in writing the **Appellant's** case fell short of requisite proof. I have re-evaluated the evidence and I find that on the whole the **Appellant's** case rested on his word against that of the **Respondent** notwithstanding the MPESA transaction. An MPESA 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. In this instance I find that the explanation given by the **Respondent** that the money deposited was in repayment of debt, really changed the equation and left the **Appellant's** case hanging on his word against that of the **Respondent**. In such an instance the only conclusion that can be drawn is the fact that a case has not been proved to the required standard in law.
14. The long and short of this is that his court finds no merit in this appeal. The same is disallowed but I shall not make any order as to costs. Each party to pay own costs.

Dated, Signed and Delivered at Kitui this 5th day of November, 2020.

R. K. LIMO

JUDGE