



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NUMBER 57'A' OF 2019

PATRICK PETER KITHINI.....APPELLANT

VERSUS

KAMAU KIMANZI.....RESPONDENT

(From the Original Kitui Chief Magistrate's Civil Suit No.61 of 2019 being an appeal from the Judgment of Hon.M.Kimani –Resident Magistrate delivered on 19th September, 2019)

J U D G M E N T

1. This appeal arose from the decision of Hon. M.Kimani delivered on 19th September 2019 *vide* **Kitui Chief Magistrate's Court** Civil Suit No. 61 of 2019. In that case **Patrick Peter Kithiki**, the **Appellant** herein, had sued **Kamau Kimanzi**, the **Respondent** herein for breach of an agreement to refund **Ksh.208,100/=** which he claimed he had advanced to the **Respondent** as a friendly loan, a fact the **Respondent** denied.

2. The trial court upon evaluation of evidence tendered before her found that no tangible evidence had been tendered by the **Appellant** to prove his case because all there was, was the **Appellant's** word against the **Respondent's**. The trial court dismissed the **Appellant's** suit for want of proof.

3. Aggrieved by the findings of the trial court, the **Appellant** lodged this appeal and raised 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 Appellant/ Plaintiff to the Respondent/ Defendant despite proof of Mpesa transaction.

(ii) That the Learned Magistrate erred in Law and in fact by holding that even after the Respondent/Defendant admitted receiving the amount of Ksh.208,000 via Mpesa from the Appellant/Plaintiff on various dates 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 the money sent to him as a loan by the Appellant/Plaintiff vide various Mpesa transactions from 8/2/2017 to 1/3/2017.

(iv) That the Learned Magistrate erred in Law and in fact by finding that the lack of a written contract or agreement means that there was no contract despite the fact that the Appellant/Plaintiff had furnished court with proof of advanced money through various Mpesa transactions to the Respondent/Defendant.

(v) That the Learned Magistrate to the fact that he is the only one who adduced records of evidence as opposed to the oral evidence backed by no proof from the Respondent/Defendant.

(vi) That the Learned Magistrate erred in Law and in fact by failing to find that the evidence adduced in court both orally and records 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 by failing to make findings on all issues raised by the Plaintiff/Appellant in his submissions and pleadings.

(ix) That the Learned Magistrate erred in law and in fact by failing to consider that the Defendant/Respondents oral evidence contradicted the defence filed in court which ultimately shifted the balance of probability into the Appellant/Plaintiffs favor.

(x) *That the Learned Magistrate erred in Law in failing to uphold rules of procedure over substantive rights of the parties.*

4. In his written submissions through counsel, the **Appellant** submits that the **Respondent** at the trial did not rebut the **Appellant's** case against him. He insists that the **Respondent** did not give names or produce any persons whom he forwarded the money that he deposited in his MPESA Account.

5. According to the **Appellant**, the **Respondent** did give reasons why he was the one channeling money to other persons instead of the **Appellant** himself.

6. The **Appellant** further contends that at the trial the **Respondent** was restless and shifty in his demeanor when put to task during cross examination. In his view, the **Respondent** was in that mood because he was afraid of the truth.

7. The **Appellant** contends that he proved his case through documentary evidence which were Mpesa transactions totalling Ksh.208,200. He relies on the case of **Kanji Jadua Valji –Versus- Trinity Prime Investment Ltd & 2 others [2014] eKLR** and in his contention that the **Respondent** never tendered any tangible evidence to prove his allegations.

8. The **Appellant** has faulted the trial court for finding that there cannot be a contract unless it is in writing contending that a friendly loan need not be in writing. He relies on the case of **Kanyi Jadua Valji (supra)** to buttress his point. He submits that the **Respondent** acknowledged receipt of money sent *via* Mpesa and that he failed to explain why the stated amount was deposited in his account. He contends that the trial Magistrate was wrong to hold that his case only rested on **Appellant's** word against that of the **Respondent**.

9. The **Appellant** urges this court to re-evaluate the evidence tendered at trial and find basis to overturn the trial court's finding.

10. The **Respondent** on the other hand has opposed this appeal through submissions made in person. He supports the finding of the trial court and submits that the trial court never made any error. He contends that it is not possible to lend someone huge amount of money without writing or having a witness to witness the transaction.

11. The **Respondent** further submits that he forwarded the money to 3rd parties in good faith and it was not possible to get the witnesses. He further alleges that the transactions were many and he could not recall all the people he paid.

12. He submits that the **Appellant's** suit was only dismissed because of the failure by the **Appellant** to proof his case.

13. This court has considered this appeal the grounds upon which it has been brought and the submissions filed by both parties. The appeal in my view raises only one issue which whether the **Appellant's** case was proved to the required standard.

14. I have perused through the pleadings and the evidence tendered because this is a first appeal and as the first **Appellate** court this court is required to re-evaluate or re-asses the evidence tendered and come up with own conclusion regarding the dispute before court.

15. The **Appellant** in his plaint had made a general claim that he advanced Ksh.208,100/= between 8th February 2017 and 1st March 2017. He also claimed to have incurred costs of Ksh.15,000/= in writing demand letter. The total amount claimed in the plaint was Ksh.223,100/=. At the hearing, the **Appellant** told the trial court that the **Respondent** needed money to re-stock his shop and pay school fees to his children and paid him money *via* Mpesa as follows:-

(i) On 8.2.2017 - Ksh.15,000/= (shops)

(ii) On 13.2.2017 - Ksh.50,000/=

(iii) On 12.2.2017 - Ksh.70,000/=

(iv) On 1.3.2017 - Ksh. 3,100/=

Total via **Ksh.138,100/=**

The **Appellant** tendered his Mpesa statement which revealed the above stated amount was paid and in addition to the above, the statement revealed another amount of Ksh.70,000/= deposited to the **Respondent** Account on 12th February, 2017. The **Appellant** did not state in his evidence during the trial court that what the deposit was all about. That in my considered view was a fatal omission because the **Appellant** had the onus of proof in his claim that he had loaned the **Respondent** a total of Ksh.208,100/=.

As it is there was some disconnect between his evidence in chief at the trial with the pleadings filed.

16. I have considered the defence filed and the testimony of the **Respondent** during trial and while it is true that the **Respondent** did not specifically deny receiving the money sent *via* Mpesa he alluded that some of the money were for errands he used to run for the **Appellant** and while some were meant for other people. It is also true that the **Respondent** did not give names of the people he conveyed the money deposited on his Mpesa account by the **Appellant** but it is trite that the burden of proof always rests on the **Plaintiff** and only shifts to the **Defendant** once the threshold is met.

17. I have re-evaluated the evidence tendered by the **Appellant** and find that the same wanting in 2 aspects. In the first place as observed above his pleadings and the testimony in court were not in tandem. Secondly and more importantly, there was really very little in the **Appellant's** Mpesa statement that could explain the purpose for which the amount was deposited into the **Respondent's** Mpesa account. The sequence of the deposit also needed some clarification because for example the deposit of ksh.70,000/= was done on 13th February 2017 while further down the statement, another deposit of Ksh.70,000/= appears to have been done on 12th February 2017. The **Appellant** failed to state that he did a deposit of Ksh.70,000/= on 13th February, 2017 after depositing another 50,000/= on the same day. He only mentioned depositing Ksh.70,000/= on 12th February 2017 and Ksh.50,000/= on 13th February 2017. The sequence is unclear but what made matters difficult is the allegations made by the **Respondent** in his defence that the money deposited in his Mpesa account was not a friendly loan but meant for some unexplained errands or payments to 3rd parties. The effect of those allegations by the fact of the **Appellant's** case really left his case resting merely on his word against that of the **Respondent**. The trial Magistrate in my view cannot be faulted in arriving at that conclusion. The **Respondent** had no obligation to prove his allegations because I find that the burden for the reasons aforestated never shifted to him so as to require him disprove what the Appellant had established.

In the end and for the aforestated reasons this court finds no merit in this appeal. The same is dismissed with costs.

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

R. K. LIMO

JUDGE