



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 80 OF 2017**

**BERNARD MUSILU KIBISU.....APPELLANT**

**VERSUS**

**CAREN ANGUCHE CHIMWENE.....RESPONDENT**

**(Appeal from the Judgment and Decree of Hon. S. N. Makila (Senior Resident Magistrate) dated and delivered on the 10<sup>th</sup> day of November 2017, in the original Kisii CMCC No. 242 of 2016)**

**JUDGMENT**

1. This judgment is in respect of an appeal filed by Bernard Musilu Kibisu, the appellant, vide the Memorandum of Appeal dated 17<sup>th</sup> November 2017.
2. The brief history of the Appellant's case is as follows. Caren Anguche Chimwene, the Respondent herein, approached the appellant on 2<sup>nd</sup> February 2015 seeking financial accommodation in the sum of Kshs 385,000/-. The parties entered into an agreement spelling out the terms under which the Appellant was extending credit to the Respondent. On 17<sup>th</sup> February the Respondent repaid Kshs 45,000/- and thus the balance of the sum advanced was Kshs 340,000/- which was to be repaid on or before 2<sup>nd</sup> March 2015.
3. On the other hand the Defendant denied that she had requested any financial accommodation from the Appellant to the tune of Kshs 385,000/-, to the contrary she averred that she had sought a short loan of Kshs 45,000/- from the Appellant and had already settled said debt in full.
4. After hearing the suit, the learned trial magistrate came to the conclusion that the Plaintiff had proved his case against the Defendant on a balance of probabilities and awarded the Plaintiff Kshs 200,000/-
5. The appellant now appeals against the decision of the trial magistrate and has raised several grounds of appeal;
  - i. *Having found and held that the contract between the Appellant and the Respondent was reduced into writing and duly executed by the parties thereto, the Learned trial magistrate erred in law in failing to uphold the terms of the contract in its entirety and thereby arrived at an erroneous conclusion pertaining to and/or concerning the monies at the foot of the contract in question.*
  - ii. *The Learned trial magistrate erred in fact and in law in disregarding and/or ignoring the pleadings filed by and/or ignoring the pleadings filed by and or on behalf of the Appellant herein and in particular, the amount in question which has been specifically pleaded in accordance and in line with the law and Rules pertaining to pleadings.*
  - iii. *The Learned Trial Magistrate erred in law, in finding and holding that the Respondent herein was liable and/or indebted to the Appellant in the sum of Kshs 200,000/- only, in lieu of Kshs 340,000/- only, which had been pleaded and proved before the Honourable Court. Consequently, the Decision of the Leaned Trial Magistrate is at variance with the pleadings, the evidence and the submissions on record.*
  - iv. *The Learned Trial Magistrate failed to cumulatively and/ or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before her (Trial Magistrate) and thus arrived at an erroneous conclusion, contrary to and in contradiction of the uncontroverted evidence.*
  - v. *The Learned Trial Magistrate arrived at a slanted and erroneous Judgement, based on the failure to appreciate and/ or discern the claim by and/ or at the instance of the Appellant.*
  - vi. *The Judgement of the Learned Trial Magistrate does not capture the issues for determination thereof and the reasons for such determination. Consequently, the Judgement of the Learned Trial Magistrate contravenes the mandatory provisions of Order 21*

6. This being a first appeal I am guided by the principles set out by the Court of Appeal in the case of **Simon Muchemi Atako & Another - Vs- Gordon Osore [2013] eKLR** where the court observed as follows:-

*“Since this is a first appeal, we are required to consider the evidence adduced before the trial court, evaluate it ourselves and draw our own conclusions, but always bearing in mind and making allowance for the fact that we did not have the opportunity which the trial court had to see and hear the three witnesses who testified. See SELLE AND ANOTHER -VS- ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123, RAMJI RATNA AND COMPANY LIMITED VS WOOD PRODUCTS (KENYA) LIMITED, Civil Appeal NO. 117 OF 2001 and HANH -VS- SINGH, (1985) KLR 716. We also bear in mind that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on a wrong principle in reaching the findings that he did. Nevertheless we are entitled to and will interfere if it appears that the trial judge failed to take account of particular circumstance or probabilities material to an estimate of the evidence or where his or her impression, based on the demeanour of a material witness, is inconsistent with evidence in the case generally. See EPHANTUS MWANGI AND ANOTHER -VS- DUNCAN MWANGI WAMBUGU, [1982-88] 1 KAR 278).”*

7. Briefly the evidence presented at the trial court was as follows. Bernard Musilu Kibisu (Pw1) testified that on 02/02/2015 he loaned the Respondent Kshs. 385,000/- and entered into a written agreement. The Respondent only paid a sum of Kshs 45,000/- and Pw1 therefore instructed his advocates to demand the balance. Pw2 and Pw3 were witnesses to the agreement and they gave evidence that the Appellant gave the Respondent Kshs 385,000/- as loan.

8. Caren Angucho Chimweni, Dw1, recalled that on 02/02/2015 she borrowed Kshs 50,000/- from the appellant and was informed that the interest was 15%. The appellant gave her a blank form to sign and write her name, and asked for a copy of her identity card. She testified that he did not prepare the agreement and that at the time she received the money, a mutual friend Millicent Onyinkwa was present. Upon being informed of this case she reported the matter to Gesonso police station as she suspected that the appellant and Millicent Onyinkwa were working together.

9. The appeal was canvassed by way of written submissions, with oral highlights at the hearing. M/s. Ochwal, Counsel for the Appellant submitted that appellant produced PExh1 and PExh2, the agreement between parties and an acknowledgement of Kshs 45,000/- respectively. The balance was Kshs 340,000/- and that was the appellant's claim. The Respondent on the other hand submitted that the trial magistrate acted on the right principles of law in arriving at her findings. They argued that the appellant failed to demonstrate before the trial court that they loaned the respondent Kshs 385,000/-.

10. The main issue raised by the appeal is whether the trial magistrate considered the evidence and pleadings before her in making the award. The Court of **Appeal in Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** cited with approval the decision of the **Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Slyvester Umaru Onu, JSC** stated that: -

*‘...It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it....*

*It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.’*

11. I have considered the judgment by the trial court and I must agree with the trial court that although the Respondent had alleged that the documents had been forged, there was no evidence tendered to sustain this allegation. The trial court observed as follows;

*“The only issue for determination is whether or not the Plaintiff has proved his case against the Defendant on a balance of probabilities. The cause of action herein arose out of the allegation that the plaintiff breached a contract between herself and the defendant for lending money. The petty cash vouchers produced as exhibits 1 and 2 supports the plaintiff's case that he and the Defendant entered an agreement for the advancement of Kshs 200,000/-.*

...

*The plaintiff presented documentary evidence in support of his claim that the defendant breached their written agreement for lending money.”*

12. It is not clear where the amount of Ksh 200,000/- referred to by the trial magistrate was based on as there was no production of petty cash vouchers. Indeed as the trial court observed the documentary evidence by the appellant were documents titled Borrowing Agreement (PExh1) and Evidence of Debt Part Payment (PExh2) indicating that the amount due to the Appellant was Kshs 340,000/-. Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya) provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The appellant proved his case on a balance of probabilities having produced documents that supported their claim. The trial magistrate's finding that the agreement was for the advancement of Kshs 200,000/- was therefore without any legal basis and must be interfered with. There was no cross appeal by the respondent on her claim that she did not borrow the amount claimed.

13. The upshot is that the appeal is allowed and the trial court award of Kshs 200,000/- is hereby set aside and substituted with the amount of Kshs 340,000/- which amount shall attract interest at court rates from the date of filing of the Plaintiff.

14. The Appellant shall have costs of the suit as well as costs of the appeal.

Dated, signed and delivered at Kisii this **9<sup>th</sup> day of April 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Ochwangi For the Appellant**

**Mr.Okemwa h/b for Mr. Mainga For the Respondent**

**Rael Court clerk**