



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 87 OF 2018

MBUVI NZOKA.....APPELLANT

VERSUS

NJOKI KIEMA.....RESPONDENT

(Being an Appeal from the Judgment and Order in Mwingi Senior Resident Magistrate's Court Civil Suit No. 28 of 2017 by Hon. K. Sambu (SPM) on 11/07/18)

J U D G M E N T

1. The Respondent herein approached the Court by way of Plaintiff claiming from the Appellant a liquidated sum of **Kshs. 105,600/=**, interest and costs of the suit. The sum of money was stated to have been advanced to the Appellant as a soft loan payable with interest of **Kshs. 1,200/=** per week.
2. The Appellant admitted having borrowed **Kshs. 10,000/=** from the Respondent but contended that he paid her the total sum and argued further that the Respondent was not a licenced banker but since he had agreed to refund the monies, he did it with interest.
3. The trial Court considered evidence adduced and reached a finding that the case was proved to the required standard. It entered Judgment in the sum of **Kshs. 105,600/=** plus costs and interest thereon.
4. Aggrieved, the Appellant appeals on grounds that:
 - That the learned trial Magistrate erred in law and facts by failing to properly scrutinize and evaluate the pleadings and submissions tendered by the Appellant and correctly relate the same to the case cited therein and thereby failed to arrive at a fair and reasonable assessment of the amount of money loaned to the Appellant.
 - That the learned trial Magistrate erred both in law and fact by concluding that the Appellant was loaned **Kshs. 10,000/=** which accrued interest of **Kshs. 95,000/=**.
 - That the learned trial Magistrate erred both in law and fact by concluding that the principle amount attracted interest at double the amount loaned and the same exceeded.
 - That the learned trial Magistrate erred both in law and fact in failing to appreciate the fact that documentary evidence produced in Court to exhibit the transactions payment done by both the Respondent and the Appellant.
 - That the learned trial Magistrate erred both in law and fact in failing to address on the interest charged as being unreasonable, unlawful and excessive in the circumstances as amount owed when the Respondent confirmed that she acknowledged receipt of **Kshs. 10,000/=** for payment.
 - That the learned trial Magistrate erred both in law and fact by holding that the Respondent is authorized to lend money with interest of such magnitude when she had no licence.
 - That the learned trial Magistrate erred both in law and fact by failing to take into consideration the Appellant borrowed with the interest agreed thereupon.
 - That the learned trial Magistrate erred both in law and fact in failing to properly take into account the proper legal principles governing lending interest rates charged prescribed by Banking Act.
 - That the learned trial Magistrate erred both in law and fact in including the Respondent was legalized and/or authorized by the law.
 - That the learned trial Magistrate erred both in law and fact in failing to take into account the Appellant submissions arguments and rely on the Respondents averments.
 - That the learned trial Magistrate erred both in law and fact by making an award on general damages that was inordinately high in favour of the Plaintiff/Respondent amounting to a miscarriage of justice.
5. It was the Respondent's case that she advanced the Appellant **Kshs. 10,000/=** in **2014** which was to accrue weekly interest of **Kshs.**

1,200/=. The Defendant paid her the sum of **Kshs. 10,000/=** in **April, 2016** without any interest as agreed.

6. The Appellant who admitted having borrowed the money stated that he agreed to pay an interest of **Kshs. 1,200/=** until he got the sum advanced. That he continued paying her **Kshs. 1,200/=** until he got the total sum of **Kshs. 10,000/=** on **27th September, 2015** that he paid.

7. Only the Appellant filed submissions to dispose of the Appeal. It was urged that the agreement between the parties was tainted by an illegality therefore the Court could not be part of the illegality and enforce an illegal claim. That the interest rate charged is illegal and not within the parameters of the lending rates of the Central Bank as the interest rates ought to be controlled by the Banking Act through the Central Bank.

8. He faulted the trial Court for appreciating that the principle amount lent attracted interest rate of more than 12 times the principle amount which is against the lending rates.

9. This being a first Appeal, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).

10. An agreement between the parties was adduced in evidence by the Appellant. The sum of **Kshs. 10,000/=** was to attract interest of **Kshs. 1,200/=** on weekly basis. In the case of **National Bank of Kenya Limited vs. Peter Nyakundi & Another (2006) eKLR** the Court of Appeal stated thus:

“... If by their agreement parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent.”

11. The trial Court found itself in a quagmire. It expressed itself thus:

“Although, the terms of the entered mutual agreement between the parties, particulars on the accrued interest of Kshs. 1,200/= on weekly basis, on the initial advanced amounts, on the face of it, appears to have been punitive and on the higher side, a Court of Law, cannot be called upon and has no discretion at all to attempt to re-write the terms of a mutual agreement between the parties.”

12. This was the view taken by the Court in **Fine Bank Limited vs. Spares and Industries Limited (2000) 1 EA 52** where it was stated that the function of the Court is to enforce that what is agreed between parties and not what the Court thinks ought to have been fairly agreed between parties.

13. The argument of the Appellant was not that the agreed rate was unreasonable or illegal. He reiterated in Court that he was not disputing the fact that he agreed to pay the interest set. His contention was that he had paid the total sum required.

14. This Court is alive to the fact that the Respondent having not been a registered lender, it was illegal for her to charge such an absurd interest rate which would have called upon the Court not to venture into the area of enforcing obligations that arose by virtue of the agreement between the parties, but the Appellant neither pleaded the illegality nor disputed the fact of being obliged to pay the sum, therefore this Court cannot usurp the discretion to vary the mutual agreement entered into by the parties herein.

15. The Respondent had a burden to prove her case to the required standard, and having been a civil case, she was required to do it on a balance of probabilities. This kind of case was defined in the case of **Kanyungu Njogu vs. Daniel Kimani Maingi (2000) eKLR** where the Court stated that when faced with two (2) probabilities, the Court can only decide a case on a balance of probability. If there is evidence to show that one probability was more probable than the other.

16. In **Miller vs. Minister of Pension (1947) Denning, J.** held that:

“The degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus proof on a balance of preponderance of probabilities means a win, however narrow a draw is not enough. So in any case which a tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

17. Pleadings by the Respondent implied that the money was advanced and there was no attempt to repay the same. In her statement dated **26th August, 2016** that she adopted in evidence the Respondent stated thus:

“... the Defendant has not paid me even a penny despite several promises to pay.”

18. In her evidence in chief the Respondent denied having been paid any sum as alleged in the defence. She denied having been paid **Kshs. 10,000/=**. Further, she denied having acknowledged anywhere any payments by the Defendant.

19. On cross examination the Respondent admitted having been paid **Kshs. 10,000/=** by the Appellant but stated that it was in the year **2016**. She however, admitted that they entered into an agreement.

20. On his part the Appellant argued that they executed an agreement and he paid the sum in the presence of **Kivivia Matini** their witness. That he paid the Respondent a total of **68,000/=** between **8th September, 2014** and **27th September, 2015**. That the Respondent had a book where he used to sign. She was the author of the entries in the book. As an individual he used to keep copies of the document of payment of the owned amount and the Plaintiff was not signing copies that he retained.

21. The Appellant adduced in evidence a copy of the agreement they entered into which was written in Kamba language. It was signed by both parties. The translation into English was by **Ngala Mulonzya Advocate**. A copy of a page reflecting entries of some money purported to have been paid is not signed by the Respondent. It bears the signature of the Appellant and the name of **Kivivya Matini**.

22. The Appellant was unrepresented; he may not have known that he may have notified the Respondent to produce the documents that were in her possession. But, the Respondent was represented by counsel, and no issue was raised in respect of the purported payment schedule that was introduced in evidence at the outset.

23. Taking into account the fact that the Respondent did not seem to be truthful in as far as her pleadings and evidence were concerned, the question to be posed would be if indeed the schedule was correct?

24. The duty was upon the Respondent to prove when exactly she received **Kshs. 10,000/=** from the Appellant. She started off by denying having received the sum then ultimately claimed that she was paid in **April, 2016**. It was necessary for her to tender evidence to that effect because the Appellant claimed to have paid her the total sum by **27th September, 2015**.

25. A scrutiny of the document would suggest that the Appellant paid interest in the months of **September, 2014, October, 2014, November, 2014, December, 2014, January, 2015, February, 2015, August, 2015, September, 2015**. Suggesting that he failed to pay in the month of **March, 2015, April, 2015, May, 2015, June, 2015** and **July, 2015**. This means that a sum of **24,000/=** remained unpaid.

26. From the foregoing, I find the Appel having succeeded to that extent. Therefore, I allow the Appeal by setting aside the Judgment and Decree of the trial Court made on the **11th day of July, 2018** that I substitute with an order entering Judgment for the Respondent in the sum of **Kshs. 24,000/=** plus costs at the Lower Court. On Appeal, each party shall bear its costs.

27. It is so ordered.

Dated, Signed and Delivered at Kitui this 2nd day of December, 2019.

L. N. MUTENDE

JUDGE