



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 5 OF 2016**

**MUTUKU KILUMI.....APPELLANT**

**VERSUS**

**DANIEL NGOIMA KIMANZI.....RESPONDENT**

**J U D G M E N T**

1. **Mutuku Kilumi**, the Appellant sued the Respondent, **Daniel Ngoima Kimanzi** claiming for **Kshs. 150,000/=** costs of suit and interest. He pleaded that he advanced the Respondent, a soft loan in the stated sum on the **29<sup>th</sup> July, 1999**. He was to inject the money into his butchery business but they were to share profits and he would refund the sum on demand. In **December, 1999** the Appellant demanded for the money but the Respondent refused and or neglected to refund the sum hence the claim.

2. In his defence the Respondent admitted having received the money but urged that he paid the total sum.

3. The learned trial Magistrate considered evidence adduced and reached a finding that the claim was not specifically proved hence dismissed it and granted the Respondent costs.

4. Aggrieved by the Judgment of the learned Magistrate the Appellant appealed on grounds that: The Appellant had proved the case; principles of law were disregarded and no proper Judgment was given.

5. The Appeal was canvassed by way of written submissions.

6. It was urged on behalf of the Appellant that the Principle of law is that it is the duty of who alleges to prove his allegations. That the Respondent admitted having been loaned **Kshs. 150,000/=** by the Appellant therefore the burden was on him to prove that he repaid the loan in a lump sum as agreed. That profit as agreed was shared four (4) times as testified by the witness. That having signed on four (4) occasions it meant that the Appellant signed for his share of profits. He faulted the Court for having failed to make a finding on the issue of the shared profits and having concluded that it was exceedingly difficult to come to terms whether actually the money was paid. That having been in doubt meant that the Respondent's exhibit was not proved therefore the sum of **Kshs. 150,000/=** was not paid.

7. It was submitted for the Respondent that the Appellant could not remember certain money transactions he had executed. His allegation that he was forced to sign documents admitting full payment of the loan was not credible. That the trial Magistrate could not be faulted for relying on a document that was produced without any objection and he evaluated evidence adduced before applying the basis legal principles before arriving at the final Judgment.

8. As a first Appellate Court, I am duty bound to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I should be slow at overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses so as to assess their credibility. (See **Selle vs. Associated Motor Boat Company Ltd (1966) EA 123; Williamson Diamonds Ltd vs. Brown (1970) EA 1**).

9. This is a matter where the Respondent did acknowledge having been loaned **Kshs. 150,000/=** that he was required to pay back upon demand. He argues that he refunded the Appellant the sum. **Section 107(2)** of the **Evidence Act** provides that:

***“(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

**Section 109** of the **Evidence Act** provides that:

***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”***

10. In the case of **Mbuthia Macharia vs. Annah Mutua Ndunga & Another (2017) eKLR** the Court of Appeal stated that:

***“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore while both the legal and evidential burdens initially rested upon the appellants, the evidential burden may shift in the course of trial pending on evidence adduced....”***

11. Parties herein reduced their agreement into writing and duly signed it. The Appellant retained the original while the Respondent took the copy. Ordinarily, it would be expected that any refund made would similarly be reduced into writing or that there would be an acknowledgement in writing duly endorsed on both agreements. The original agreement adduced in evidence has no endorsement suggesting compliance with the terms of the agreement.

12. It was the Plaintiff's evidence that the sum of money he loaned the Respondent was never refunded and after the incident where the Respondent accused him of having an intimate relationship with his wife and battering him, he said that the sum would serve as a compensation for the illicit affair.

13. In the course of cross examination he was shown the copy of the agreement that was in possession of the Respondent. He only acknowledged his first signature appended on the document. He stated that on the night he was being assaulted he was coerced to sign a document he referred to as a book. He denied having appended a subsequent signature on the copy of the agreement but stated that he signed on the book under duress stating that he had no claim against the Respondent to acknowledge having received **Kshs. 150,000/=**. He was shown a book with transactions from the butchery.

14. He stated that he did not remember transactions of **Kshs. 10,000/=** and **Kshs. 10,000/=** respectively, but denied having received **Kshs. 60,000/=**. He admitted having sold cows to the Respondent and received payment thereof. Regarding **Kshs. 19,000/=** he stated that he did not know when he received the sum and he said that he could see a sum of **Kshs. 40,000/=**.

15. The book with transactions that went on between him and the Respondent was not adduced in evidence to enable the Court discern what exactly the transactions were all about.

16. The Respondent stated that the money the Appellant was receiving used to be paid in his office and they would deduct the sum from the sum owing but the Appellant was not signing for the sum received. That he only signed for the last payment.

17. In his evidence in chief he stated that:

***“.... I did take the carbon copy. That he says that I never paid him the monies. That I used to pay him in my office. That it is in the carbon copy that he used to deduct. That he never used to sign. Its last monies he signed. I do seek to produce the carbon copy.”***

18. The writing on the copy of the agreement (D.Exhibit 1) is not made in one hand but several. The Respondent failed to explain the circumstances in which the writings were made and by which people. He was silent on the arrangement they had of sharing the net profit. It is indicated some “three cattle” then “for 3 cows” and a sum of **Kshs. 25,000/=** respectively deducted. He did not explain what it was about.

19. DW2 **Joseph Mue Mungala** stated that he was present when the Appellant and Respondent entered into the agreement. He came up with the allegation of having been a partner of the two individuals an issue that was not mentioned by both of them. He claimed he was a witness to payment of the refund. He claimed that the sum of **Kshs. 150,000/=** was paid in hand, in a form of cattle and cash. This witness did not identify the agreement. This was not a credible witness.

20. There were terms of agreement expressly stated. It was upon the Respondent to explain if they were varied. This was not done. In the premises the alleged payment of the money must be disregarded as this was not proved on a balance of probabilities.

21. In the result, the Appellant did prove on a balance of probabilities that the sum of **Kshs. 150,000/=** as stipulated in the agreement was not paid. Therefore the Appeal has merit and is allowed. The Judgment of the Lower Court is set aside and substituted by a Judgment in favour of the Respondent in the sum of **Kshs. 150,000/=** plus costs and interest, both at the Lower Court and of the Appeal.

22. It is so ordered.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of September, 2018.**

**L. N. MUTENDE**

**JUDGE**