



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 32 OF 2013**

**DANIEL MOKUA MANYURA .....APPELLANT**

**VERSUS**

**BENJAMIN NYAATA OBINCHU.....RESPONDENT**

*(Appeal from the Judgment and Decree in Kisii CM Civil Case No. 791 of 2006 (Hon. Njeri Thuku - RM.)*

**JUDGMENT**

1. This appeal arises from the judgment of the Resident Magistrate made on 8<sup>th</sup> October 2010, **Kisii CMCC No. 791 of 2006**, in which the appellant, **Daniel Mokuu Manyura**, had been sued for damages by the respondent, **Benjamin Nyaata Obinchu**, for the sum of Ksh. 84,000/= being money advanced to him for the purchase of a motor vehicle payable after a period of one month.

2. It was averred in the plaint dated 6<sup>th</sup> November 2009, that the money was borrowed by the appellant (defendant) from the respondent (plaintiff) vide a written agreement dated 15<sup>th</sup> June 2003, but the appellant failed or neglected to refund it despite the respondent's demand and notice of intention to sue.

The respondent therefore prayed for the said amount or repossession of a motor vehicle Reg No. KZY 907 Nissan Caravan together with interest and costs of the suit.

3. The appellant denied the claim vide a statement of defence dated 9<sup>th</sup> May 2008, and in particular that he entered into a written agreement with the respondent for the sum of Kshs. 84,000/=. He contended that if there was any agreement then it was verbal and it involved a sum of Kshs. 60,000/= which had since been paid.

4. The appellant also contended that the alleged motor vehicle Reg No. KZY 907 was unknown and had no linkage with the respondent's claim. That, no demand for repayment was made and instead unorthodox means, forgery and misuse of police officers were employed by the respondent to intimidate him.

The appellant therefore prayed for the dismissal of the respondent's case.

5. At the trial, oral evidence was received from the plaintiff/respondent, Benjamin Nyaata Obinchu(**PW 1**) and the defendant/appellant Daniel Mokuu (**DW 1**).

The plaintiff did not call any witness but two witnesses, **Nyambati Ouru Mongare (DW 2)** and **Nelson Osebe Omwenga (DW 3)** testified for the defendant.

6. Thereafter, the learned trial magistrate delivered a judgment in favour of the respondent/plaintiff.

The appellant/defendant was aggrieved by the decision and preferred the present appeal on the basis of the grounds in the memorandum of appeal dated 22<sup>nd</sup> March 2013.

At the hearing of the appeal, directions were given that the appeal be heard by way of written submissions.

7. The appellant filed his submissions through **Asati, Anyona & Co. Advocates**, while the respondent did likewise through **Nyatundo & Co. Advocates**.

This court has given due consideration to the rival submissions in the light of the grounds of appeal. Its duty at this juncture is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the opportunity to see and hear the witnesses (see, **Selle Vs. Associated Motor Boat Co. Ltd [1968]EA 123**).

8. In that regard, the evidence adduced by the parties and the availed witnesses has been considered by this court which is of the view that indeed a friendly loan was advanced to the appellant by the respondent. This is a fact which was not disputed. The dispute was centred on the actual amount lent to the appellant by the respondent who are uncle and nephew respectively. Also disputed is the actual date of the transaction.

9. From the respondent's evidence in cross examination, it would appear that a sum of Kshs. 70,000/= was advanced to the appellant on 10<sup>th</sup> April 2003 and was payable within a period of two months. This did not happen and therefore on 15<sup>th</sup> June 2003, the respondent presented an agreement to the appellant for his signature. The respondent said that the amount had accrued to Kshs. 84,000/= due to the charged interest of 20% per month.

10. It would appear that every monthly default in payment attracted additional interest which eventually came to a sum of Ksh. 130,000/= which was higher than the alleged principle amount of Kshs. 70,000/=.

The agreement (P.Ex 1) was relied upon by the respondent to claim a sum of Kshs. 84,000/= although the actual transaction conducted on 10<sup>th</sup> April 2003, involved a lesser amount and was apparently verbal.

11. Therefore, the agreement (P.Ex 1) allegedly signed by the appellant on 15<sup>th</sup> June 2003, was invalid and unenforceable. It could not be relied upon as a basis for the respondent's claim of Kshs. 84,000/=. However, in his testimony, the appellant conceded that he received a sum of Kshs. 60,000/= from the respondent on the 10<sup>th</sup> April 2003. He stated that the amount was to assist him purchase a motor vehicle in Nairobi and was to be repaid after one month. He confirmed that the agreement was verbal and implied that it did not provide for a charge of interest by the respondent.

12. From the foregoing, this court may safely state that the amount loaned to the appellant by the respondent on the 10<sup>th</sup> April 2003 was the sum of Kshs. 60,000/=. This was the amount due to the respondent from the appellant, no more no less. The claim of Kshs. 84,000/= by the respondent was just but an attempt to unjustly enrich himself at the expense of the appellant.

13. Having found that the appellant was indebted to the respondent in the sum of Kshs. 60,000/= only, the next question that may be asked is whether the amount was ever repaid by the appellant.

The respondent implied that the amount was outstanding as at the time of filing his claim. However, the appellant indicated that he repaid a sum of Kshs. 14,000/= on 20<sup>th</sup> May 2003 and a further sum of Kshs. 9,000/= on the 17<sup>th</sup> July 2003. He later repaid a sum of Kshs. 30,000/= bringing the total repayment to a

sum of Kshs. 53,000/=.

**14.** The first repayment of Ksh. 14,000/= and the second repayment of Kshs. 9,000/= are not supported by any credible document and/or receipt. The inscription at the back of the copy of the exhibited agreement (P.Ex 1) indicating the repayments aforementioned is not proper documentary evidence of repayment of the alleged sum.

**15.** With regard to the sum of Kshs. 30,000/=, the document dated 4<sup>th</sup> February 2004 (D. Ex 2) shows that the amount was repaid by the appellant on that date in the presence of three witnesses who included Nyambati (DW 2) and Nelson (DW 3).

Indeed, the two witnesses confirmed in their respective testimonies that the amount was paid to the respondent by the appellant.

**16.** The amount thus established as having been repaid by the appellant was the sum of Kshs. 30,000/= and not Kshs. 53,000/=, or the entire amount of Kshs. 60,000/= as he alleged. Therefore, the appellant is truly and justly indebted to the respondent in the sum of Kshs. 30,000/= only. This is the amount which the trial court should have awarded the respondent rather than Kshs. 84,000/=.

This appeal must and is hereby allowed to the extent that the judgment of the trial is hereby set aside and substituted for a judgment in favour of the respondent/plaintiff against the appellant/defendant in the total sum of Kshs. 30,000/= only.

**17.** The respondent shall be entitled to the costs of the suit and interest in the lower court but the appellant shall be entitled to the costs of this appeal.

In winding up, it is worthy mentioning that it was a grave error for the trial court to strike out a defence at the time of judgment when it was evident that the statement of defence had already been accepted by the court, filed and served upon the respondent and when it was clearly treated as having been proper on record and relied upon by the appellant in defending himself against the respondent's claim.

**18.** The trial court gave undue regard to matters of technicality at the expense of the substance of the defence and hence to the prejudice of the appellant.

Nonetheless, the error has been cured in this appeal which is allowed as indicated hereinabove.

**[Delivered and signed this 7<sup>th</sup> day of February 2017].**

**J.R. KARANJAH**

**JUDGE**

**In the presence of**

Mr. Magara holding brief for Mr. Anyona for Appellant

Mr. Nyatundo for Respondent

CC Njoroge/Dorothy