



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CIVIL APPEAL 468 OF 2003**

**PHILLIP ANTHONY MATHEWS.....APPELLANT**

**VERSUS**

**FERINA KESHAVHJEE.....RESPONDENT**

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

1. The appellant Phillip Anthony Mathews is aggrieved by the judgment of the Principal Magistrate in the Chief Magistrate's Court at Nairobi, entered against him in the sum of Sterling Pounds 2,500/=. The suit in the lower court was filed against the appellant by Ferina Keshavjee (hereinafter referred to as the respondent).
2. As per a plaint filed on 12<sup>th</sup> December, 2002, the respondent claimed he lent the appellant a sum of Sterling Pounds 4,000 in the years 1997/1998. In payment, the appellant issued 16 post dated cheques each being £250. Upon presentation, the first 6 cheques were honoured. Thereafter the next 3 cheques were dishonoured. The appellant then requested the respondent to return all the post dated cheques back to him for replacement. The respondent did so, but the appellant neither replaced the cheques nor paid the outstanding loan. The respondent therefore prayed for judgment in her favour for £2,500 being the outstanding loan.
3. In his statement of defence, the appellant denied that the respondent had lent him £4,000, and further denied the existence of any agreement. The appellant also denied issuing the respondent with post dated cheques of £250 each in purported settlement of the amount alleged to have been borrowed. The appellant averred that the respondent was at all times his girlfriend with whom he cohabited, and that based on that relationship, he issued some cheques to the respondent in consideration for love and affection. Six of the cheques were duly honoured, but the rest of the cheques were recalled by the appellant when the relationship between the appellant and the respondent was severed. The appellant further claimed that the court had no jurisdiction to hear the suit, as the transaction was partly done outside the jurisdiction of the court.
4. During the trial, the appellant and the respondent each testified in support of his/her case reiterating the facts pleaded. The respondent elaborated that she lent the money to the appellant to enable him purchase a Range-rover, and that it was agreed that the appellant was to refund the money. She produced copies of correspondences exchanged between her and the appellant, regarding the cheques and the

repayments. Under cross-examination, the respondent denied having introduced the appellant to Rupin Rajani.

5. The appellant explained that he was entitled to a tax-free car. They discussed with the respondent and agreed to import a car from England. He bought the vehicle using his savings and loans from Barclays Bank. He purchased a 1991 Range rover. The respondent referred the appellant to one Rupin Rajani who was to handle the clearing of the motor vehicle. The appellant paid Rupin Rajani Kshs.650,000/=. He did not however clear the motor vehicle. The appellant demanded his money back but Rajani only offered him 6 cheques but he later died. The appellant contended that he was to pay the respondent what was considered to be her investment in the motor vehicle on condition that the motor vehicle was made legal and cleared. The appellant claimed that he could not recall the exact amount invested by the respondent, but claimed it was between 2000 to 3000 pounds. He conceded having issued cheques to the respondent.

6. Under cross-examination, the appellant admitted having written the letter to the respondent agreeing to refund her the sum of £4,000. He contended that the payment was in respect of the Range-rover. He maintained that the 16 cheques were issued in consideration of love and affection. He explained that he was to pay the cheques if the motor vehicle was cleared. He denied owing the respondent any money.

7. In her judgment the trial magistrate found that the cheques issued to the respondent by the appellant were drawn by the appellant after the two had separated, and therefore they could not have been issued in consideration of love and affection. The trial magistrate further found that the appellant having admitted issuing the cheques, the provisions of the Bills of Exchange Act were clear that he has to pay their value in full. She therefore found the respondent's case proved and entered judgment in favour of the respondent.

8. The appellant has raised 5 grounds of appeal against that judgment as follows:

(i) The learned magistrate erred in law and fact by disregarding the submission that the plaintiff failed to discharge the burden of proof borne under Section 107 of the Evidence Act Cap 30 by establishing her case on balance of probabilities.

(ii) The learned magistrate erred in law and fact by disregarding the submissions that the letter dated 25<sup>th</sup> May, 1999 relates to different subject matter (i.e. plaintiff's shares in range rover H623 LFC) from the subject matter pleaded in the plaint being a claim for loan advanced upon an alleged agreement.

(iii) The learned magistrate erred in law and fact by failing to find that there was no lending agreement and/or evidence of loan advancement, the amount advanced, evidence of the amount paid and the amount outstanding as pleaded in the plaint.

(iv) The learned magistrate erred in law and fact by failing to find that the plaintiff had failed to prove any consideration for the amount claimed in the plaint and by disregarding the submissions that any amount of money given to the plaintiff was in consideration of love and affection notwithstanding the fact that there was no reply to the defence and enough evidence was adduced by DW1.

(v) That the learned magistrate erred in law and fact by entering decree in sterling pounds and thereby converting in Kenyan Shillings.

9. Mr. Maleche who appeared for the appellant submitted that the respondent having pleaded that there was an agreement entered into by the parties, under Section 107 of the Evidence Act the burden was upon the respondent to demonstrate the existence of the agreement. He contended that the respondent did not discharge this burden and her case was therefore not proved. Mr. Maleche further argued that the trial magistrate failed to appreciate that the letter (produced as p.exhibit 1) which was written by the appellant to the respondent was in respect of a different issue with regard to Range-rover H623 and not a loan agreement. Regarding the cheques, Mr. Maleche maintained that it was wrong for the court to rely on the Bills of Exchange Act. He therefore urged the court to allow the appeal and dismiss the respondent's suit.

10. Mr. Katiku who appeared for the respondent maintained that there was clear evidence that the respondent advanced money to the appellant to enable him purchase a Range-rover. He submitted that given the relationship between the parties a written agreement was not necessary. Mr. Katiku maintained that the trial magistrate properly appreciated the evidence before her. He therefore urged the court to dismiss the appeal and adopt the judgment of the lower court.

11. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. I have also considered the submissions made by counsel. It is common ground that between 1996 and 1999, the appellant and the respondent were lovers and even cohabited together. Although there was no formal agreement entered into by the parties for the purchase of the Range-rover, both are agreed that the appellant purchased the Range-rover and that the respondent made some payments which according to the appellant, was for shipping.

12. The appellant put the amount paid by the respondent at between 2,000 and 3,000. However in his letter dated 25<sup>th</sup> May, 1999 which was addressed to the respondent, the appellant attached a series of post dated cheques in respect of the respondent's share in the above vehicle. In paragraph 2 of the letter the appellant states inter alia "*this being full and final settlement and refund of your investment of £4,000/=*". This was a clear admission that the amount due to the respondent was £4000. Contrary to the appellant's contention that the cheques were issued in consideration of natural love and affection, the letter confirms that the cheques were issued in full and final settlement and refund of the respondent's investment of £4,000/.

13. In her plaint the respondent did not specify what the sum £4,000 she allegedly loaned the appellant was for. However, this came out in evidence when the respondent testified that the money was to facilitate purchase of motor vehicle. Whilst the appellant denied that the respondent lent her money for purchase of the motor vehicle, he did concede that she paid some money for shipping of the motor vehicle and this is what he referred to as the respondent's investment in the motor vehicle.

14. I find that it is immaterial whether the money paid by the respondent is called an investment or a loan. The fact is that the motor vehicle was being purchased by the appellant and that the appellant did agree to refund the respondent the money she had paid. This is evident from the correspondences exchanged and the cheques referred to. The issue of natural love and affection, cannot therefore arise. I find that there was ample evidence before the trial magistrate to prove the respondent's case to the required standard.

15. Accordingly I find no merit in this appeal and do therefore dismiss it with costs.

Those shall be the orders of this court.

**Dated and delivered this 4<sup>th</sup> day of May, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Kabita H/B for Maleche for the appellant

Advocate for the respondent absent

Erick – Court clerk.