



**Mukhwana v Walela & another (Civil Appeal E041 of 2022)
[2025] KEHC 15770 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E041 OF 2022
REA OUGO, J
OCTOBER 29, 2025**

BETWEEN

ALBERT WAFULA MUKHWANA APPELLANT

AND

FOSTER WAFULA WALELA 1ST RESPONDENT

EDWIN BARASA CHWALA 2ND RESPONDENT

*(An appeal from the judgment from Chief Magistrates Court of
Kenya at Bungoma delivered by Hon. A Odawo SRM, dated 9/5/2022)*

JUDGMENT

1. At the subordinate court, the respondents filed a suit alleging that they faced criminal proceedings in Bungoma Criminal Case No. 504 of 2020, and the appellant was paid Kshs 87,000/- to withdraw the case against them. The appellant failed to withdraw the case as agreed, and the respondent sought to be refunded Kshs 87,000/-. The appellant, in his defence, denied receiving the amounts.
2. The trial magistrate in her judgment found that the respondents proved their case and awarded them Kshs 87,000/-. The appellant aggrieved with the finding has lodged this appeal on the following grounds, (reproduced as stated in the grounds of appeal):
 1. The learned trial magistrate erred in law and facts by asserting that I pay money to the plaintiffs that whom I never received any money from any plaintiff without reading the verdict as the plaintiffs were in custody at Bungoma GK prison by the indicated dates.
 2. The learned trial magistrate erred in law and fact by holding and declaring that the appellant pays monies he did not receive from the plaintiff, depending/basing on hearsay without any proof of the facts of the claim, and any OB of police of any station availed in court of the trial court in the matter of Criminal Case No 504/2020.



3. The learned trial magistrate erred in law and fact by introducing new names in the Criminal Case No 504/2020, basing the probation report that (sic) committed the plaintiffs on only one accused, leaving out any of the 1st accused persons, on how he paid the claimed money, and the probation officer never testified in court to support the report.
 4. The learned trial magistrate erred in law and fact by completely disregarding to record, the proceedings and the evidence and thus arrived at a decision that had no basis.
 5. The learned trial magistrate erred in law and fact by failing to appreciate that the alleged claims by the plaintiffs had no basis in law and for the fact that the same (if any) was barred and overtaken by events that they never raised in the matter of criminal case that raised in their claim.
 6. The learned trial magistrate erred in law and fact by creating her own names in the matter of Criminal Case No 504/2020 without putting into consideration that there was no accused known as Edwin Baraka Chwala and/or Edward Baraka Chwala, Foster Wafula Walela.
 7. The learned trial magistrate erred in law and fact by declaring the false report of the Bungoma Probation Officer, basing on only one person and who never testified in court for the 2nd accused, without the report in relation to the 1st accused to support his claim, if any money was paid by him as indicated in the report of the 2nd accused.
 8. The learned trial magistrate erred in law and fact by not reading the verdict in court when I raised to know about the ruling, just saying go and pay them money without reading the verdict of the proceedings of the case.
3. The appellant, in his submissions, contends that the respondent did not provide a written agreement or proof of payment of said amount. Secondly, the disputed amount was provided by a third party, who was the proper party to sue, rather than the respondents.
 4. The respondent relied on sections 107 and 109 of the *Evidence Act* and submitted that they proved that there was an oral contract and that the appellant was paid the sums. They testified that the third parties referred to by the appellant were its agents. Upon the trial court's satisfaction that the sums had been paid to the appellant, the burden then rested upon him to account for and justify the purpose for which the funds were received.

Analysis And Determination

5. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court, both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424].
6. The respondents testified as Pw1 and Pw2. They testified before the trial court that the appellant requested payment of Kshs 87,000/- to withdraw the case, and he was paid the same on 10/12/2020. However, he failed to withdraw the case. Samuel Okumu Barasa (Pw3) testified that he is the first cousin of the 2nd respondent. He testified that the appellant had asked him for Kshs 50,000/- so that he could withdraw the case against the 2nd respondent. Janet Naliaka Chwala (Pw4) testified that they sold a cow and bull to raise the Kshs 50,000/-. They testified that although the appellant was given the said sum, he failed to withdraw the case.
7. According to the plaint and the testimonies of Pw1, Pw2, Pw3, and Pw4, it emerged that the appellant approached the respondents' relatives seeking payment in exchange for withdrawing the case. The



agreement, therefore, was between the appellant and the respondents' relatives, as the evidence adduced showed that the respondents themselves were not directly involved. Consequently, the respondents were not privy to the said contract. In *William Muthee Muthami v Bank of Baroda*, CA NO 91 OF 2004, the court held that a contract affects only the parties to it and that it cannot be enforced by or against a third party. The respondents, being a third party, did not have any rights under the contract that they could lawfully enforce.

8. Although the respondents were of the view that the appellant should withdraw the case, Article 157 (6) (c) of *the Constitution* provides that the Director of Public Prosecutions may discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions. Therefore, the respondent did not have the power to withdraw the case against the respondents.
9. According to the appellant, the disputed amounts were paid on 10/12/2020 after both the appellant and the respondents had testified and the respondents had been convicted. The probation officer noted in his report that the appellant was paid Kshs 50,000 by the relatives of the respondents as compensation for the expenses incurred during treatment. The trial court, while sentencing, considered the probation report. Therefore, it took into account that the appellant had received money from the respondents' relatives.
10. Although the trial magistrate held that compensating the appellant would amount to unjust enrichment, I respectfully disagree. In my view, the payment constituted lawful restitution or compensation.
11. Consequently, the appeal is allowed and the decision of the subordinate court is set aside. There shall be no orders as to cost.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF OCTOBER 2025

R.E. OUGO

JUDGE

In the presence of:

Albert Wafula Mukhwana - Appellant

Foster Wafula Walela - 1st Respondent

Edwin Wafula Chwala -2nd Respondent

Wilkister -C/A

