

**REPUBLIC OF KENYA**

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

**HCCA NO. E028 OF 2023**

**SANJAY LAVA.....APPELLANT**

**VERSUS**

**NILESH KUMAR KRISHINNA KUMAR LAKHILANI**

**(suing as the legal rep. of the estate of KRISHINA KUMAR**

**SHIVALAL LAKHILANI alias KRISHINA KUMAR SHIVLAL LAKHILANI-**

**Deceased.....RESPONDENT**

*{Being an appeal from the decision Chief Magistrate's Court at Meru delivered on 30/1/2023 in Meru CMC. 162 of 2019 by - Hon. J. M.Njoroge - Chief Magistrate}.*

**JUDGMENT**

**Background**

1. The respondent filed suit in the lower court seeking Ksh. 1,000,000/= from the defendant. The respondent stated that the money was the balance due and owing from the

appellant from a soft loan that he had taken from the deceased on 18/3/2017.

2. At the conclusion of the trial, Judgment was entered for the respondent against the appellant as was sought with costs and interests.
3. Aggrieved by the said Judgment, the appellant filed a Memorandum of Appeal dated 28<sup>th</sup> February 2023 in which he raised the following grounds:

***a) THAT the learned trial magistrate erred in law and fact in returning a finding that the Respondent had proved his case on ab lance of probability without sufficient evidence.***

***b) The decision was against the evidence tendered and therefore erroneous.***

4. The appellant seeks an order that the Judgment of the lower court be set aside, with costs therein and in the lower court.

#### **Appellant's Submissions.**

5. The appellant submitted that there was no sufficient evidence tendered to support a finding that the respondent

had proved his case on a balance of probabilities. That the court erred in believing the respondent and not him. It was thus argued that the respondent had failed to discharge her burden of proof under Section 107 of the Evidence Act.

6. The respondent did not file any submissions.
7. Being a first appeal, this court's duty is as was set out **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where the Court of Appeal for East Africa stated follows: -

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular***

***circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”***

8. It is thus the duty of the court to look into the evidence adduced and make a determination on whether the respondent had proved her case on a balance of probability.
9. The evidence of the respondent and his witness was that the deceased had advanced the appellant Ksh. 2,500,000/= which he was to pay back with interest. That the appellant duly paid back Ksh. 1,500,000/=, leaving a balance of Ksh. 1,000,000/= by the time the deceased passed away.
10. The appellant denied the allegations. He conceded that the deceased was his close friend and that the two used to assist each other with cash. He conceded during cross-examination that the deceased had given him a loan of Ksh. 2.5 Million. During the same cross-examination he claimed that he had

repaid the loan in full. On re-examination, he stated that he was not obliged to pay the money back.

11. From the evidence of the respondent, Dorothy (PW2) and even the appellant himself there is no doubt that the appellant was advanced the loan of Ksh. 2.5Million. However, there is no sufficient evidence that the loan was to attract an interest as alleged by the respondent.
12. On whether the loan was repaid, there are two versions. The first is that by the respondent that only Ksh. 1.5Million with interest was paid. The second is by the appellant who claimed to have repaid the loan in full. As stated earlier, he also stated that he was not obliged to repay the loan.
13. Since there was no written agreement, the court has to rely on the oral evidence that was tendered and determine if the respondent discharged his burden of proof on a balance of probabilities.

14. In ***Mumbi M’Nabea - Vs- David M. Wachira (2016)***

**eKLR**, the court described what proof on a balance of probabilities entails. It was held that:-

***“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not....This position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:***

***“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the***

***person who wishes the Court to believe in its existence.”***

15. The Court of Appeal relied on the locus classics on the issue in Miller -vs- Minister of Pensions [1947] 2 ALL ER 372 where Denning J. described that proof as follows:-

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

16. In ***William Kabogo Gitau -vs- George Thuo and 2 others (2010) 1KLR 526***, Kimaru J, (as he then was) had this to state on the same issue:-

***“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”***

17. Applying these principles, I have considered the evidence adduced before the trial court. I am satisfied that there was proof that the appellant had received the loan of Ksh. 2.5 Million from the deceased. I am also of the view that, the loan was not fully repaid as alleged. The appellants own

evidence was contradictory, hence difficult to believe. Did he pay the loan as he alleged or was he not obliged to repay it? He was not clear on this.

18. From the foregoing, I find no reason to disturb the finding of the trial magistrate.
19. Consequently, I find that the appeal lacks merit and it is dismissed with costs.
20. On question of interest, it is very clear that the deceased was not licensed to disburse loans on interest. Therefore, any imposition of interest as set out in the plaint would be unlawful.
21. Further, the interest on the claim could only be computed from the date of filing the suit and not from 2017 as claimed by the respondent in his plaint.

22. Therefore, the interest will be computed from the time for filing the suit, at court rates.

**Signed, dated and delivered at Meru this 4<sup>th</sup> day of  
November, 2025.**

**H.M. NYAGA  
JUDGE**