



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wachira v Kuria (Civil Appeal E106 of 2022)  
[2024] KEHC 6100 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E106 OF 2022**

**HI ONG'UDI, J**

**MAY 30, 2024**

**BETWEEN**

**JANE WANJIRU WACHIRA ..... APPELLANT**

**AND**

**PENINAH WANGARI KURIA ..... RESPONDENT**

*(Being an appeal from Judgment and decree delivered on 31st January, 2022 by Mrs S. G. Gitonga – Resident Magistrate/Adjudicator in Milimani SCCCOM 1114 of 2021)*

**JUDGMENT**

1. Jane Wanjiru Wachira the appellant filed a claim for Ksh 924,000/= from Peninah Wangari Kuria the respondent in the lower court. The respondent denied the claim and the matter proceeded to full hearing. In the end the learned trial Magistrate found the claim not proved and dismissed it with no order as to costs.
2. Aggrieved by the Judgment, the appellant filed this appeal citing the following grounds:
  - i. That the learned honourable Magistrate/Adjudicator erred in law and in fact in failing to consider the documentary evidence, the pleadings and the witness testimony adduced by the claimant in support of her claim.
  - ii. That the learned honourable Magistrate/Adjudicator erred in law and in fact in disregarding the weight of the evidence before her and in holding that the only issue for determination was whether the claimant was entitled to the relief sought.
  - iii. That the learned honourable Magistrate/Adjudicator erred in law and in fact in failing to give consideration to the demeanor and credibility of the witnesses in their oral testimony and documentary evidence in court regarding the document dated 14<sup>th</sup> April, 2015.



- iv. That the learned honourable Magistrate/Adjudicator erred in law and in fact in failing to consider all the evidence before her and the agreement between the parties which satisfied the requirements of a valid binding contract.
  - v. That the learned honourable Magistrate/Adjudicator erred in law and in fact in finding that the document dated 14<sup>th</sup> April, 2015 was only a letter and not an agreement contrary to the oral documentary evidence before her.
  - vi. That the learned honourable Magistrate/Adjudicator erred in law and in fact in finding against the weight of evidence that the claimant had not satisfied her claim on a balance of probability for Ksh 924,000 advanced on a loan to the respondent.
  - vii. That the learned honourable Magistrate/Adjudicator erred in law and in fact in giving weight to the respondent's rebuttal and statement, and dismissing the appellant's claim.
  - viii. That in her overall consideration of the pleadings the evidence and witness testimony in the suit the honorable Magistrate/Adjudicator was overtly based in favour of the respondent and thereby reached an erroneous decision.
3. A brief summary of the case before the lower court is that the appellant claimed to have loaned the respondent a sum of Ksh 924,000/= which is equal to 10,000 USD.
  4. The appellant presented two witnesses i.e herself and the husband who testified as CW1 and CW2 respectively. CW1 told the court that the respondent is her sister. That she advanced her the said amount but she has refused to pay. She testified that an agreement acknowledging receipt of the money was signed by both parties and witnessed by the appellant's husband. She produced the agreement plus seven other documents as PEXB 1-8.
  5. Her husband CW2 told the court that he is the one who went to the bank and withdrew 10,000 US dollars. He took the money to CW1 who then took the money to the respondent who had financial problems.
  6. The respondent testified as RW1 she denied receiving any money saying she only wrote a letter requesting for money which she was not given. In cross examination she said she was only to release her lorry for their use after receipt of the money. She denied ever meeting as family to negotiate on anything.
  7. After the close of the case both parties filed submissions. The trial court thereafter delivered the judgment dismissing the claim on 31<sup>st</sup> day of January, 2022.
  8. The Appeal was canvassed by written submissions.

### **Appellant's submissions**

9. These were filed by Maira & Ndegwa advocates and are dated 4<sup>th</sup> December, 2023. Counsel submitted that the evidence by the appellant and her witness including the several documents produced supported the claim against the respondent. He contended that the appellant entered into a binding contract with the respondent and the latter must honour it. Reliance was placed on the case of:  
  
Manta Peeush Mahajan (suing on behalf of the estate of the late Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan  
  
He argued that the defence by the respondent was a mere denial.
10. On the burden of proof counsel cited the case of *Kanyungu Njogu V David Kimani Maingi* [2003] eKLR cited in *Eastern Produce (K) Ltd – Chemomi Tea Estate V Bonfas Shoya* [2018] eKLR. He argued



that in the present case the trial ought to have decided the case on the balance of probability in favour of the appellant as the appellants claim was more probable than the respondent rebuttal. Counsel went ahead to accuse the trial court of bias against the appellant. Since her denial was not supported by any evidence.

11. He pointed out that the respondent's witness statement and oral evidence were not in agreement. He stated that her statement talked of an exaggerated sum but did not explain the extent of the exaggeration. The family unresolved issues were not stated.
12. Finally, he urged the court to allow the appeal or in the alternative order for a re-trial before another court.

### **Respondent's submissions**

13. Despite being given sufficient time to file submissions the respondent failed to comply.

### **Analysis and determination**

14. Having considered the grounds of appeal, record of appeal and submissions by the appeal I find that the main issue for determination is whether the appellant proved her claim on a balance of probabilities. The next issue is whether this matter should be referred for retrial before another court.
15. This being a first appeal, this court had a duty to re-evaluate and reconsider the evidence afresh and come to its own conclusion. See
  - i. *Selle V Associated Motor Boat Co. Ltd & others* [1968] E. A 123
  - ii. [\*Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates\* \[2013\] e KLR.](#)
16. The claim in this matter is based on an alleged agreement or contract entered into by the appellant and respondent. This document is dated 14/4/15 and was signed by the respondent, appellant and the witness (appellant's husband).
17. A reading of this agreement which is said to have been done by the respondent (borrower) nowhere indicates that the money was released to the respondent. It is a request and the mode of repayment. The mode of repayment is not by itself evidence of receipt of the money.
18. Secondly the document does not indicate how the money was given to the respondent, was it released by cash or it was deposited in an account? As rightly stated by the trial court, the evidence in the document produced as an agreement ought to have been supported by evidence of withdrawal of the money by the respondent's husband. (CW2). There was nothing difficult for him getting the withdrawal slip or even a bank statement to fill the missing gap in the document dated 14/4/2015.
19. The appellant has in the alternative requested for re-trial. How would a re-trial assist the appellant? Is it for her to avail additional evidence? That is not what this appeal is about.
20. From my analysis I do not find any error in what the trial court did. I therefore dismiss the appeal since the respondent did not participate in the appeal I will not make any order as to costs.
21. Orders accordingly

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**



**JUDGE**

