



REPUBLIC OF KENYA



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**Shimega v Malesi (Civil Appeal E013 of 2023)
[2024] KEHC 7830 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7830 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E013 OF 2023
SC CHIRCHIR, J
JUNE 27, 2024**

BETWEEN

FORESTUS J.A. SHIMEGA APPELLANT

AND

SHEILA MALESI RESPONDENT

*(Being an Appeal against the judgment of Hon. C.J Cheruiyot in Kakamega
SMCC Civil No. E148 of 2022 delivered on 28th November 2022)*

JUDGMENT

1. The Respondent herein filed suit at Kakamega small claims court seeking recovery of a loan of ksh. 10,000 that she allegedly advanced to the Appellant on 29.1.2021.
2. The appellant filed a response and a counterclaim seeking for ksh. 46,820, being the aggregate of the value of his television set at ksh. 34,820 and travelling costs of ksh.12,500.
 1. In a Judgment delivered by on 28 .11. 2022 the trial court entered judgment in favour of the Respondent herein.
 2. Aggrieved by the judgment the Appellant proffered this Appeal and set out the following grounds:
 - a). That the trial magistrate decision was arrived at in a cursory and perfunctory manner and was biased, unjust and indefensible and has resulted in a miscarriage of justice.
 - a. That the learned honourable magistrate erred in both law and fact in failing to judicially exercise the discretion bestowed upon her by *the constitution*.
 - b. That the learned trial honourable magistrate has denied the appellants the right to a fair trial hearing and it's against their constitutional rights.



- c. That the learned trial honourable magistrate failed to analyse the appellant's pleadings and submissions.
 - d. That the decision of the learned trial honourable magistrate has led to miscarriage of justice.
 - e. That the honourable magistrate erred in law and in fact in allowing the claimant the claim suit with costs.
3. The appeal was canvassed by way of written submission by the parties.

Appellant's submissions

4. The Appellant submits that none of the respondent's witnesses was privy to the agreement and that the trial court allowed the respondent claim based on the fact that the appellant had his loan without taking into consideration the agreement terms and the appellant's case.
5. He avers that he was not accorded a fair hearing contrary to Article 50 (1) of *the constitution* since the trial magistrate had selective interpretation of their agreement.
6. The appellant avers that the trial erred in interpreting the word "purported" appearing in the agreement to mean "proposed" and that she failed to correctly interpret the phrase "any other movable property." It is his submission that the phrase suggest that there was a movable property at the time of signing the agreement which was the television.
7. He argues that through the impugned judgment, the respondent was effectively allowed to keep the television whose value exceeded the amount claimed as well as the interest and cost of Kshs. 10,000/=
8. He submits that the trial magistrate ignored the evidence of DW2 who was an Agent of the Respondent herein and believed the testimonies of witnesses who were not present when the money was borrowed.
9. He stated that he was ready to pay the sum of Kshs. 10,000/= if the respondent returned the television set.

Respondent's submissions

10. It is the respondent's submission that the appellant never gave her any television or receipt at the time he gave the loan of Kshs. 10,000/= to the appellant.
11. She further questioned whether there four or three people who were present when the television set was handed in as there is contradiction on the Appellant's testimony and his witness on the number of people present.
12. It is further submitted that the TV was to be security in the event of default and that the trial court was right in its interpreting the word "purported" to mean intended. Summary of the Evidence
13. The first witness was the claimant. She testified that the respondent went to her shop in the company of DW2 and requested for ksh. 10,000 ; that they signed an Agreement dated 29.1.2021 (Exb1), which was witnessed by DW2, Hellen and Ramadhan. She sated that the loan was a friendly one and that DW2 was a brother to the Appellant.
14. On re-examination, she claimed that she worked as an Mpesa agent and she had given a friendly loan to the Appellant.



15. The Claimant's 2nd witness was one Hellen. She testified that the claimant was her employee and the respondent was their customer. she stated that she saw the respondent receive the loan of Kshs. 10,000/= although she did not sign the agreement and that the respondent used to give friendly loans to people known to her.
16. During re-examination, he stated that the respondent did not bring a TV at the time of receiving the loan or at a later date.
17. The 3rd witness was Ramadhan. He knew the claimant as he was also a customer in her shop. He testified that he was in the claimant's shop on the day that the Appellant went to borrow the money, and he saw the Appellant being given the money. He admitted that he did not witness the agreement though. He did not see the Appellant bring a TV .
18. The 4th claimant witness was the claimant's father. He testified that he knew the Appellant. He stated that when Appellant defaulted in payment his daughter sent him to look for him. He made a visit to the Appellant during a follow up of the said loan and the Appellant did not tell him about any television he gave out.
19. The 1st respondent witness was the Appellant . He told the court that he came to know the respondent through DW2; that the Respondent herein gave her ksh. 10,000 but deducted ksh. 2000 as interest. He further told the court that he took the TV set to the claimant's shop . He did not have any documentary evidence but he said the hand- over was done by DW2. The TV was to act as security for the loan.
20. He told the court that he thereafter went to the claimant's shop four times , time in an attempt to pay the money and get his TV back , to no avail.
21. The Appellant's 2nd witness was Peter Machika . He told the court that he knew the claimant as he used to get her potential customers. He also used to collect debts on her behalf , he stated.
22. He further testified that he knew the respondent and that he introduced him to the claimant who was given Kshs. 10,000/= as opposed to the Kshs. 20,000/= which he had requested. He sated that they took the TV set as security.

Determination

23. This is a first Appeal and the role of as been stated in many past decisions of the superior courts. In *Gitobu Imanyara vs A.G (2016)e KLR* the court of Appeal held: “ An appeal to this court by the high court is by way of retrial and the principal 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 allowances in this respect.”
24. Appeals to the small claims court to the high court are only allowed on points of law. Section 38(1) of the *Small Claims Court Act, 2016* (“the SCCA”) “A person aggrieved by the decision or an order Appeals of the Court may appeal against that decision or order to the High Court on matters of law. (2) an appeal from any decision or order referred to in subsection (1) shall be final.”
25. What constitutes point(s) of law has been a subject of discussions by the superior courts.
26. For instance , it has been held that conclusion that are not supported by the evidence submitted and the law is a point of law. In *Timamy Issa Abdalla vs Swalleh Salim & 3 others (2014) e KLR* it was held: This court's jurisdiction to re- assess the evidence and draw its own conclusions must be exercised with caution since its jurisdiction to draw its own conclusions can only apply to conclusions of law.



If such conclusions are erroneous , that is to say, they are not supported by evidence and the law , the matter becomes a point of law.”

27. Failure to exercise discretion is equally a point of law as was held In the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, where the court stated that;-

“ This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
28. In its ground of appeal, the appellant held that the trial magistrate failed to judiciously exercise their discretion . They further argue that the trial magistrate failed to analyse their pleadings and submission which led to the miscarriage of justice. He finally sated that he was not accorded a fair trial.
29. The question of whether the Appellant was accorded a fair hearing, whether the trial court properly analysed the evidence before arriving at its conclusion and finally whether the conclusions arrived at was based on evidence are all issues of law.
30. On whether the conclusions arrived at by the trail court was based on evidence, in paragraph 5 of the judgment , the court stated “ It is not in dispute that the respondent borrowed ksh. 10,000 from the claimant as evidenced by the loan Agreement dated 29th /01/2021”. It is evident therefore that the court based its findings on the agreement dated 29/01/2021 (Claimant’s Exb 1).
31. I have looked at the said agreement . The agreement is signed by the borrower and a Guarantor , one Peter Ayoyi Machika. The agreement is between Forstus Shimenga (the Appellant herein and Sheila Malesi Likhana , the Respondent herein. However the said Sheila has not signed the agreement.
32. What is the effect of unsigned Agreement ?
33. In the UK case of Reveille Independent Vs Anotech international(UK) Ltd 2016 EWCA CIV 443 as cited in the case of Erick Barasa Makokha & 2 others vs Neema ya Mungu Investments Co Ltd the court had this to say about the effect of such agreements: “ A draft agreement can have contractual force , although the parties do not comply that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicate this albeit a court will reach this conclusion lightly” (Emphasis added)
34. From the evidence it emerged that the was a dispute on whether the Appellant’s television set was to act as security for the loan. The Respondent based her argument on the word “purported” appearing on the agreement to demonstrate that the security was yet to be provided. On the other hand the Appellant insists that the words “ any other movable property” indicate that some other security had been previously provided.
35. Thus there is no consensus as to whether security had been given or not . In the circumstances I will consider that the parties do not appear to have agreed on all the terms of the agreement. Bearing in mind the caution referred to in Reville case(supra) , it is my finding that the trial court ought not to have based its decision on the unsigned agreement.
36. Nevertheless, in his written statement and oral evidence during cross – examination the Appellant readily admitted that the Respondent herein gave him ksh. 10,000. This was an express admission on his part. On the other hand the Respondent denied ever taking the Television set as security.



37. It is a principle of law that admitted facts need not be proved. (Ref: Order 2 Rule 11 of the procedure Rules) . Further in the case of Choitram vs Nazari (1984) KLR 327, the court of appeal gave the following guidelines when considering admissions: The court held: "... admissions can be express or implied. Either on the pleadings or otherwise.... Admissions have to be plain as pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them , without requiring a magnifying glass to ascertain their meaning..."
38. Am of the considered view that the Appellant’s admission during his evidence- in- chief and cross-examination amounted to an obvious admission, and falls under other modes of admission categorised as “ otherwise in Choitram case(supra).
39. It my finding therefore that whereas the trial court erred in relying on unsigned contract in the circumstances of this case, the Respondent is e still entitled to judgement, on grounds of admission.
40. On the Appellant’s counterclaim , the Appellant’s allegation that he deposited a television set was denied by the Respondent herein, both in response to the Appellant’s response and in her testimony in court. The burden was on the Appellant herein to prove his counterclaim, namely: that he delivered a Television set worth ksh. 34,800. He had no receipt of purchase or any other document to prove ownership. Am therefore not satisfied that the Appellant proved his counterclaim on a balance of probabilities.
41. The appellant avers that he was given a fair hearing without laying a basis of this claim. However a perusal of the record but a perusal of the record shows that he was given a chance to prosecute his case, and his testimony and that of his witness was taken into consideration.
42. I do not find any merit in the Appeal, and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF JUNE 2024

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin – court Assistant.

Appellant.

Ms Masakwe for the Respondent.

