PKE v SNM (Civil Appeal E003 of 2021) [2023] KEHC 17683 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17683 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E003 OF 2021

LW GITARI, J

MAY 25, 2023

BETWEEN

PKE ..... APPELLANT

AND

SNM ..... RESPONDENT

JUDGMENT

Background

1. This appeal arises from the Judgment in the Chief Magistrates' Court at Chuka Civil Case No 99/2016. In that suit the appellant who was the plaintiff had filed a plaint seeking the following prayer:

   " A order for dissolution of the marriage between the parties."

   It was based on the allegation that the appellant and the respondent had cohabited as husband and wife and there were two issues. That the two had contracted a marriage under the Meru Customs and short of that there was a presumption of marriage.

   The respondent who was the defendant in the suit filed a statement of defence and denied all the allegations in the plaint and prayed that the suit be dismissed with costs.

2. The suit proceeded to full trial and parties adduced evidence before the learned trial magistrate. In her Judgment, the learned trial magistrate held that there was no customary marriage between the parties which was capable of being dissolved and therefore the matrimonial offences pleaded did not arise. The learned trial magistrate proceeded and dismissed the suit with costs to the respondent.

3. The respondent was aggrieved by the decision of the learned trial magistrate and proceeded to file this appeal.

   The Appellant has raised the following grounds of appeal:

i. That the learned magistrate erred in law and fact by failing to find that the Appellant was the husband to the Respondent by virtue of long cohabitation and repute.

ii. That the learned magistrate erred in law and fact by arriving at a decision that was contrary to the evidence tendered.

iii. That the learned magistrate erred in law and fact by failing to find that there was a presumption of marriage that the Appellant is the husband to the Respondent after finding that the two lived together for several years out of which they sired two children.

iv. That the judgment was against the weight of the evidence.

The appeal was canvassed by way of written submissions.

The Submissions

4. It was the Appellant's submissions that he demonstrated in evidence that the Respondent was married to him in 1999 and began to cohabit the same year until 2014. That in those 15 years, they lived together as a family and begot two children. Further, that considering the long period of time that he cohabited with the Respondent, the Appellant had proved on balance of probabilities that there existed a presumption of marriage between him and the Respondent.

5. In addition, it was the Appellant's submission that he had laid grounds for the dissolution of the said marriage. The Appellant thus prays for this appeal to be allowed by a finding that the trial court failed to factor in the requisite elements for a presumption of marriage.

6. On her part, the Respondent did not file her submissions despite having sufficient time to do so and this Court having noted so, proceeded to give a date for the delivery of the judgment.

Issues for determination

7. I have considered the record of appeal, the grounds of appeal raised therein as well as the submissions by the Appellant. The main issues that that arise for determination are:

a. Whether the trial court erred in finding that the presumption of marriage did not exist between the Appellant and the Respondent, and if so

b. Whether the Appellant laid grounds for dissolution of the marriage.

Analysis

8. This is a first appeal and it is the duty of this Court imposed by law to evaluate afresh by way of a retrial the evidence recorded before the trial court in order for it to reach its own independent conclusion. In *Selle V Associated Motor Boat Co Ltd* (1968) EA 123 the court held as follows in this regard:

> " The court must consider the evidence, evaluate itself and draw its own conclusion though doing so it should always bear in mind that it neither heard witnesses and should make due to allowance in respect. However, this court is not bound necessarily to follow the trial judge's finding of fact as it appears either that he had 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."

See also *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* (1982-88) 1KLR for the proposition that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of evidence or the Judge showed demonstrably to have acted on wrong principles.

It is apparent from the memorandum of appeal that the issue is whether the trial court could presume a marriage by virtue of long cohabitation and repute. Both parties adduced evidence and below is an analysis of the evidence.

Analysis of Evidence:

9. The Appellant testified as PW1. He stated that he knew the Respondent as his wife. That he married the Respondent in 2004 under Kimeru custom by taking one goat and sheep which they slaughtered and ate. That they had two children together but the Respondent left the Appellant's house to go and cohabit with another man who she is currently living with. The Appellant thus prayed for a divorce. He adopted his statement where he had stated that they had cohabitated at Chogoria where they had a matrimonial home.

10. PW2 was Kiriungi M'Rewa. He stated that they took a goat, sheep, and Kshs 20,000/= and the Appellant and Respondent started living together as a family. On cross examination, he stated that they only went with the Appellant to the elders and did not involve the parents of the Respondent. He testified that he never met the in-laws and only went there once.

11. PW3 was Elias Kimathi, he adduced evidence similar to that of PW1's testimony that they took a goat, sheep, and Kshs 20,000/= to the Respondent's family in 1999. It is only him and PW2 who accompanied the appellant.

12. On her part, the Respondent herein testified as DW1. She denied being the Appellant's wife stating that they were just friends and that no rituals were done for a customary marriage to be said to have existed. It was therefore her stand that there was no need for a divorce. On cross examination, it was her testimony that she did get a child with the Appellant but he then disappeared when she was expectant. She further denied that the Appellant took goat and sheep to her home. The Respondent thus prayed for the claim to be dismissed.

13. DW2 was Miku M'Iria, the Respondent's father. He testified that he did not know the Appellant and only came to see him in court. That no emissaries have ever been sent to his place and he has never seen any goat brought to his place as dowry payment for the Respondent's hand in marriage to the Appellant.

Analysis of the Issues:-

Whether Presumption of Marriage by cohabitation existed between the Appellant and the Respondent

14. The question whether a marriage can be presumed is a question of fact it is not based on any law but is largely dependent on facts and circumstances which tend to prove that the intention of the parties by living together are so living as husband and wife. It must be demonstrated that there exists long continuous cohabitation and there is a general repute that the parties are husband and wife.

15. The appellant has cited the Court of Appeal decision in *Philis Njoki Karanja & 2 Others –v- Rosemary Mueni Karanja & Another* NRB C A Civil Appeal No 313/2001 (2009) eKLR where the court held that-

> " Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute, that long cohabitation is not where friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed."

16. The appellant has relied on the fact that himself and the respondent were married in 1999 under the Meru Customary Law and started living together as husband and wife. It is his contention that during the said cohabitation they were blessed with two children. The fact that the parties had two children is not in dispute as the respondent admitted that the two children MMP aged 15 years and TMP aged 9 years were fathered by the appellant. It is however my considered view that the fact of a couple having children together is not enough to demonstrate existence of marriage. What this court has to determine and which was also the issue before the trial court is whether the appellant proved on a balance of probabilities that there was a marriage.

17. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

> "
>
> " 107.
>
> 1 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

I will consider this on the two aspects, that is;

i. Existence of customary marriage.

ii. Presumption of marriage.

Existence of Customary Marriage:

18. I have considered the evidence adduced by the parties before the trial court. On the one side, the Appellant alleged that he contracted a marriage under Meru Customary Law. On the other side, he urges the court to presume the existence of a marriage by virtue of long cohabitation and repute.

19. In the *restatement of African Law*, Kenya Vol 1 Chapter 4 by E Cotran for a valid customary law marriage involving the Meru and Tharaka consent of spouses and families of spouses are necessary. Further marriage consideration or dowry is paid on behalf of the bridegroom to the father or a guardian of the bride. Cotran in his book on page 38 under 111 Marriage consideration stated as follows:-

> "
>
> " 1. Definition of marriage consideration (ruracio)

> Ruracio is a payment or payment of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father or other guardian of the bride, or the agreement to pay, which is necessary to the validity of the marriage and to establish the affiliation or legal control of the issue of the union, and which may be repayable in whole or in part of the dissolution of the marriage. Ruracio must be distinguished from collateral payment and other gifts made at the time of the marriage (for which see p.39) which are not returnable on the dissolution of the marriage.

20. The appellant has contends that there was a customary marriage between him and the respondent. Section 43 of the *Marriage Act* which forms the law for the customary marriage provides:-

    1. " A marriage under this part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

    2. Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage."

21. It is therefore necessary for this court to determine whether dowry was paid. The appellant and his two witnesses adduced evidence that is PW2 & 3 that they took a sheep and a goat to the parents of the defendant and also paid Kshs 20,000/-. Surprisingly, they never testified as to who was given the purported dowry. According to PW2; they were not accompanied by the appellant's parents, they never met the in-laws and never went back there. Similar evidence was given by PW3 who testified that he never met with appellant's parents to pay the dowry.

22. The testimony of PW2 & 3 contradicted that of the appellant in some very material particulars whereas PW2 & 3 were categorical that they were not accompanied by the appellant's parents, the appellant maintains that his parents were present during the alleged marriage. The contradictions are an indication that they were not telling the truth. The evidence of the appellant and his two witnesses falls short of the enquired standard of proof. The respondent had in her statement given an elaborate procedure and undertaking that a man and a woman must undergo for there to be a Meru Customary Marriage. According to the respondent when a Meru man and woman come together and decide to get married, they report to their respective parents. The man goes to the woman's home and is introduced. The parents enquire as to whether the two clans are allowed to inter-marry. The man then request her hand in marriage. The parents on both sides then meet at the grooms parents home to negotiate dowry. The parents of the man give a sheep (ewe) and a ram. The agreed dowry is then paid. This includes a tin of honey, about twenty (20) litres, 2 blankets, 2 suits, 1 sack of sugar a bag of millet and a bull.

23. There is no dispute that these are the essentials of the Meru Customary Marriage. ' *Eugene Contran in Restatement of Customary Law Kenya* Volume –1 on marriage and Divorce Page 38' states as follows:-

> " Marriage consideration may be paid all at once, but more usually, it is paid by instalments.
>
> In Meru Law, it is not essential to pay an instalment before cohabitation begins. However, before cohabitation starts there must be an agreement to pay. The marriage is valid so long as there is an agreement to pay."

24. The appellant had the burden to prove that he married the respondent through customary law. He who alleges must prove. The appellant did not discharge this burden. The evidence relied on by the appellant is discredited. It failed to prove that even the basics of the marriage like meeting the respondent's parents was achieved. Marriage is a public affair and involves the two families, relatives and friends.

25. The appellant has failed to prove that he met the parents of the respondent and the issue of the dowry settled.

26. The appellant has not discharged the burden to prove that dowry was paid as required under Section 43 of the *Marriage Act* (*supra*). The Meru Customary Law laid down by the respondent and her witness is explicit on the ceremony as well as the specific items to be given or to be paid to the parents of the woman. There ceremony involves procedures which are witnessed and are confirmed by the parents on both sides to cement the bond of marriage and is usually not one day event. It is even surprising that from 2004 to 2014 the appellant never went back to the respondent's parents home and yet he had not paid the full dowry or undertaken the various ceremonies that go with a marriage ceremony. I find that the appellant did not prove that payment of dowry was made under Meru Customary Law Marriage and did not therefore prove that there existed a valid customary marriage between him and the respondent that was capable of being dissolved by an order of the court.

27. In this case, the Respondent's father testified that he had never received any payment as dowry. Further, PW2 testified that he only went with the Appellant for the alleged dowry payment ceremony while PW3 testified that they went the three of them. Considering the evidence in totality, it is my view that the inconsistencies in the Appellant's evidence do not, on a balance of probabilities, support his claim of there being a marriage between him and the Respondent.

Presumption of Marriage:-

28. What this court has to determine under this head is whether any other form of marriage exist between the appellant and the respondent. The claim by the appellant is that there is a presumption of marriage by cohabitation. The appellant contends that he cohabitated with the respondent from the year 1999 until 2014, a period of fifteen years.

29. On the other hand, the respondent contends that she never lived together with the appellant as husband and wife.

30. The concept of presumption of marriage by cohabitation is a principle of common law. It is a principle that where a man and woman have cohabitated for such a length of time and in such circumstances as to have acquired a reputation of being a man and wife, a lawful marriage between them will generally be presumed though there may be no positive evidence any marriage having taken place.

    See *In Re-Estate of Mbiyu Koinange (deceased)* (2015) eKLR.

31. The presumption can be rebutted by a party presenting weighty and credible evidence to the contrary. The appellant relies on the Court of Appeal decision in *Joseph Wanjiru –v- Kabui Ndegwa Kabui & Another* (2014) eKLR where the court held:-

> " There is long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on Section 119 of *Evidence Act*, Cap 80 Laws of Kenya, which provides as follows:-
>
> > "119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common court of naturel events, human conduct and public and private business, in their relation to the fact of the particular case."

> "The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded.
>
> However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances who the parties by long cohabitation or other circumstances evidenced an intention of living together as husband and wife."

32. For a party to establish the presumption of marriage, two ingredients must be proved, that is,

    a. Long continuous cohabitation between a man and a woman.

    b. General Repute

    On the issue of long continuous cohabitation.

33. In my view the appellant did not give credible evidence of long continuous cohabitation with the respondent. He gave casual evidence of having lived together at Chogoria but never stated that they had a matrimonial home where he lived with the respondent and the two children. The two lived together at Chogoria. The respondent's defence was that the appellant was a casual visitor and a friend and that the two never shared a roof for a day and night. The appellant did not prove that there was a long and continuous cohabitation. It would seem the applicant was trying his luck or testing the waters. His evidence concentrated on prove of existence of customary marriage which he never proved on a balance of probabilities. He then swings to presumption of marriage. He ought to have then brought some evidence to prove the presumption. The second ingredient is General Repute. The appellant and the respondent are residents of Chogoria and having lived there long enough, the appellant ought to have called evidence to prove that the community regarded him and the respondent as husband and wife. In any case, the appellant never called his parents or siblings to adduce evidence that they considered the two as husband and wife. The burden was on the appellant to proof the presumption of marriage.

34. I find that the appellant did not adduce sufficient evidence to prove on a balance of probabilities that there was a presumption of marriage between him and the respondent by virtue of long cohabitation and repute.

Conclusion

35. I find that the Judgment by the trial magistrate was sound and cannot be said to have been against the weight of the evidence. For the reasons stated, I find that this appeal is without merits. I order as follows:-

    1. The appeal is dismissed.

    2. I make no orders as to costs as the respondent minimally participated in the appeal by only filing a notice of change of advocates.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF MAY 2023.

L W GITARI

JUDGE