



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 59 OF 2019**

**MICHAEL OLIECH ONYANGO .....APPELLANT**

**VERSUS**

**FREDRICK ODHIAMBO .....RESPONDENT**

***[Being an appeal from the Judgment and decision of Hon. M. GITUMA, Resident Magistrate***

***dated the 10<sup>th</sup> April, 2019 at Maseno Law Courts in CMCC No. 25 of 2019]***

**JUDGMENT**

This appeal relates to the question about the person, as between the Appellant and the Respondent, who should be given authority to bury **RUTH PAMELA ONYANGO**.

1. The trial court had held that Ruth Pamela Onyango (“*the Deceased*”) was married to the Respondent **FREDRICK ODHIAMBO**.
2. In the circumstances, the learned trial magistrate expressed the considered view that the marital union gave to the Respondent the Closest Link to the deceased.
3. The Appellant, **MICHAEL OLIECH ONYANGO**, is a brother of the deceased. He had insisted that the deceased was never married to the Respondent.
4. As far as the Appellant was concerned, the deceased was a single lady and that therefore, her body ought to be released to him, so that he could have her remains buried at the home of her mother in Konuonga Village, Oyugis.
5. The trial court had found that the Respondent and the deceased were not married under any form of statutory marriage.
6. Secondly, the trial court made a finding that the Respondent and the deceased had no customary marriage as they had not met all the pre-requisites for a Luo Customary Marriage.
7. Nonetheless, the trial court had held that a marriage could be presumed between the two of them.
8. The Appellant submitted that the trial court erred when it held that a presumption of a marriage arose in the circumstances prevailing in this case.
9. His said submission was premised on the grounds that the evidence on record did not prove the existence of cohabitation.
10. If anything, the Appellant said that the deceased and the Respondent did not live together continuously for long periods.
11. Even when the deceased and the Respondent stayed together, the Appellant points out that such times were interrupted when the deceased was either in Nairobi or in Katito, during school holidays.
12. It was also the Appellant’s contention that no evidence was tendered by the Respondent to prove how he and the deceased used to carry themselves.
13. I understand the Appellant to be suggesting that witnesses should have testified that the deceased and the Respondent conducted themselves as a husband and wife.

14. The Appellant went on to state that the meeting at which a decision was arrived at, that the Respondent be allowed to bury the deceased, there was no representation by the family of the deceased.
15. As far as he was concerned the person who had portrayed himself as “*the head of the family*” of the deceased, had also confirmed that prior to the demise of the deceased, neither he nor any other member of the deceased’s family had known about the alleged marriage.
16. Therefore, the Appellant saw, in the testimony of **PW4**, confirmation that there was no marriage between the deceased and the Respondent.
17. The Appellant emphasized that the inclusion of the deceased, as his dependent on the Respondent’s NHIF Card, was not enough proof of his marriage to the deceased.
18. Furthermore, the parentage of the child who was born by the deceased and the Respondent, was said to be irrelevant in proving whether the said parents were in a marriage. As far as the Appellant was concerned;

**“..... siring a child together is not and can never be a basis of proving a marriage relationship.”**

19. The Appellant went on to submit that the Respondent did not have a home, as he lives in one of the rental houses which had been constructed by his mother, **PW2**.
20. That position was contrasted with the fact that the deceased had a home at Oyugis, where her parents had been buried.
21. In the circumstances, the Appellant urged this court to hold that because the deceased was not married to the Respondent, she ought to be buried at her ancestral home.
22. Being a first appellate court I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions therefrom.
23. I am alive to the fact that I did not have the benefit of observing any of the witnesses when they were giving evidence.
24. And even as I start the process of re-evaluating the evidence on record, I note that both parties restricted their respective submissions on the issue about the legal presumption of a marriage.
25. As the Appellant pointed out;

**“During the hearing of the claim filed by the Plaintiff at the Lower Court, the main issue for determination was whether the deceased herein was married to the Plaintiff, now the Respondent. If the answer is in the affirmative, then the Respondent was the closest in line to whom the deceased’s body was to be released to.”**

26. The Plaintiff, Fredrick Odhiambo, (*hereinafter “Fredrick”*) testified as **PW1**. He said that he first met the deceased, Ruth Onyango, in September 2015.
27. Fredrick and Ruth became friends in 2015 and they remained friends all through 2016.
28. By January 2017, the two of them had become lovers. In effect, their friendship had blossomed into intimacy.
29. As at May 2017, Ruth visited Fredrick at his place, where she stayed for 2 weeks.
30. At the end of the said 2 weeks, Ruth returned to the University to finish her exams. After she finished her exams, Ruth visited Fredrick at his place, for 2 days.
31. Fredrick testified that Ruth left his place and went to Nairobi, where she stayed with the Defendant, Michael Oliech Onyango (*hereinafter “Michael”*).
32. In August 2017, Ruth informed Fredrick that she was pregnant, and she told him that she would like to live with him as husband and wife.
33. It was the evidence of Fredrick that he and Ruth agreed to live together as husband and wife, and that they would raise their baby together.
34. Fredrick informed his mother, brothers and uncles about their intention.
35. From September 2017, Ruth visited Fredrick’s mother regularly, and on 15<sup>th</sup> December 2017 she was officially introduced to Fredrick’s extended family.
36. In February 2018, after Ruth gave birth, she lived with Fredrick.

37. In September 2018 Ruth fell ill. Her sister, Emily, gave to Fredrick some money which Fredrick used to register his family for NHIF. Fredrick registered Ruth and their child as his dependents.
38. When Ruth was discharged from the Moi Teaching and Referral Hospital, she went to Maseno, in the company of her sister, Grace.
39. More specifically, Ruth made it clear to her sister, Grace, that her son could not be taken away by Grace, even though Ruth was still feeling unwell.
40. Ruth declined the offer by Grace, to look after the child. She chose to have the child stay with Fredrick's mother.
41. It was the testimony of Fredrick that Ruth's sisters were comfortable with having the child staying with Fredrick's mother.
42. During cross-examination, Fredrick stated that the proof of his marriage to Ruth were to be found in the fact that the two of them had a son and that Ruth was cited as both his next of kin and his dependent on his NHIF Card.
43. As the Appellant pointed out, the fact that Fredrick and Ruth had a son together was not sufficient proof that they were married.
44. But it is noteworthy that Fredrick's mother, (*Mama Susan Awino Osoko*) was informed by Michael's sisters, Grace and Emily, that their sister Irene had passed away.
45. Mama Susan attended Irene's burial at Awasi, where she was accorded recognition as the Mother-in-law to Ruth.
46. In the case of MARY WANJIKU GITHATU Vs ESTHER WANJIRU KIARIE [2010] eKLR, the Court of Appeal said;
- “..... where parties do not lack capacity to marry, marriage may be presumed if the facts and circumstances show the parties, by a long cohabitation or other circumstances evinced an intention to living together as husband and wife.”***
47. It is to be noted that a presumption of marriage may arise where there has been long cohabitation or other circumstances which evinced the parties intention of living together as husband and wife.
48. In this case, the learned trial magistrate made a finding that Ruth and Fredrick cohabited from the time when Ruth gave birth to their son.
49. I find that the evidence of the said cohabitation was proved by both Fredrick and his mother.
50. But it is also true that Ruth would stay with her brother, Michael, when she was on holidays from the University and also when she was on attachment.
51. In a literal sense, Ruth and Fredrick did not always live together.
52. Would the fact that Ruth sometimes lived with her brother imply that the relationship she had with Fredrick had been interrupted?
53. The trial court came to the conclusion that the mere fact that a married man and his wife lived apart because of factors such as that each of them was working in different towns, cannot connote a dissolution or an interruption of their marital union.
54. I am persuaded that the reasoning by the learned trial magistrate, in that respect, is an accurate statement of law and fact.
55. I would add that just because Ruth stayed in various hospitals, where she was being accorded medical treatment, cannot be deemed as an interruption of the relationship she had with Fredrick.
56. In the case of RLA Vs F O & ANOTHER, HCCC NO. 205 OF 2015 Mabeya J. noted that in a “*marriage of reputation*”;
- ..... the couple must have carried themselves as man and wife not only to their close friends but also relatives and other acquaintances. Their actions and lifestyle should leave no doubt in the minds of those who know them and even strangers that the couple must be in a marriage relationship and not necessarily a relationship of convenience.***
- .....
- In a marriage relationship, the couple is expected to take care of and be responsible for and protect each other. They are expected to be not only the closest but to be there for each other at all times.”***
57. In this case, Fredrick listed Ruth as his wife and dependent, on his NHIF Card.
58. Of course, he did not even have money to pay for the Card, as he was then still a student.

59. It is very notable that none other than Ruth's sister, Emily, gave money to Fredrick to enable him register his family for NHIF.
60. Emily could easily have paid for Ruth's NHIF Card. But she chose to provide the money to Fredrick, so that it is he who would register Ruth and their son, for NHIF.
61. That conduct speaks volumes, about the recognition by Emily, of Fredrick's relationship to Ruth.
62. Further recognition of the said relationship was demonstrated by the family of Ruth, when Fredrick's mother was accorded respect as a mother-in-law, during the burial of Ruth's sister, Irene.
63. In other words, the desire by Ruth and Fredrick to live as a husband and wife was not just a private matter between the two of them. The two of them lived together and supported each other openly, in such manner as left no doubt in the minds of those who knew them, that they were a husband and wife.
64. Fredrick had no obligation to enlist Ruth as his wife in his NHIF Card, if he did not consider her to be so.
65. He would derive no personal benefit by enlisting Ruth as his wife and dependent.
66. His action was a declaration of the nature of their relationship. It was a demonstration of responsibility for and the desire to provide protection to Ruth.
67. When Ruth succumbed, whilst she was admitted at the Kenyatta National Hospital, none other than Michael turned to Fredrick, for support in settling the medical bill. Fredrick did not hesitate in making available his NHIF Card, which was used in paying the bill.
68. In my considered view, Fredrick's action was not simply one of convenience.
69. He demonstrated his continued commitment to be there for Ruth, even in death.
70. Although the various pieces of evidence about the relationship between Ruth and Fredrick, if taken separately, may not be a basis for holding that there was a presumption that their relationship was a marriage, I have no doubt that the cumulative effect of the entire body of the evidence provides a solid foundation for a valid presumption of a marriage between the two.
71. Accordingly, I find no merit in the appeal. It is therefore dismissed.
72. However, I order that each party will pay his own costs of the appeal.
73. And although I have no obligation to say anything more, I feel obliged to call upon the parties to make a serious attempt to give Ruth, a person who both of them have professed love and concern for, an honourable funeral.

**DATED, SIGNED and DELIVERED at KISUMU This 24<sup>th</sup> day of July 2019**

**FRED A. OCHIENG**

**JUDGE**