



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 19 OF 2017**

**BMM.....APPELLANT**

**- VS-**

**NAS.....RESPONDENT**

**(Being an Appeal an Appeal from the Hon. Chief Magistrate E. Nyaloti**

**delivered on 19<sup>th</sup> January 2017 in Civil Suit No. 7961 of 2016 at Milimani Commercial Court).**

**JUDGMENT**

1. This is an appeal from CMCC No. 7961 of 2016 delivered on 19.1.2017.
2. The Appellant B.M.M filed CMCC 7961 of 2016 on 22.11.2016 seeking a declaration that he has legal capacity to conduct a statutory marriage with one **EKM** and that he never married the Respondent herein N. A.S.
3. The trial Court held that there was a marriage by cohabitation between the Appellant and the Respondent and therefore the appellant did not have capacity to contract a monogamous marriage unless he first dissolved the marriage between him and the Respondent.
4. The appellant was aggrieved with the said finding and he filed an appeal on the following grounds:
  - (i) **THAT the learned trial Magistrate erred in law by failing to consider the Appellant's case in delivering a judgment that was one sided.**
  - (ii) **THAT the learned trial Magistrate erred in law and in fact by holding that the parties herein were married.**
  - (iii) **THAT the learned trial magistrate misdirected herself by holding that there existed a matrimonial property which formed the basis of the marriage.**
  - (iv) **THAT the learned trial magistrate erred in fact and in law by relying on extreme issues which were unsupported by evidence.**
  - (v) **THAT the learned trial magistrate erred in fact and in law by failing to recognize that the Appellant was indeed married to EKM.**
  - (vi) **THAT the learned trial magistrate erred in fact and in law by failing to appreciate that the Appellant and EKM had contracted a Kamba Customary Marriage.**
  - (vii) **THAT the learned trial Magistrate erred in law by failing to hold that no witness from the Respondent's family was called to support her purported marriage to the Appellant.**
  - (viii) **THAT the learned trial magistrate erred in law and in fact by failing to uphold the law as provided for under the Marriage Act, 2014.**
  - (ix) **THAT the trial learned magistrate erred in law and in fact by failing to appreciate that the Respondent's witnesses admitted to holding grudges against the Appellant.**

**(x) THAT the learned trial magistrate erred in law and in fact by failing to allow the Appellant's case though supported by cogent and unshakable evidence.**

5. The Parties were directed to file written submissions in the Appeal and the Appellant filed submissions dated 9.11.2019 while the Respondents submissions are dated 5.3.2018.

6. The Appellant submitted in summary as follows:

**(i) THAT he never married the Respondent and that they were romantically involved and they were blessed with two children MM and MK.**

**(ii) THAT the Appellant intended to contract a statutory marriage with one EK but the Respondent herein raised an objection.**

**(iii) THAT a presumption of marriage cannot be inferred between him and the Respondent as they did not hold out each other as husband and wife and that they did not consistently live together for a long period of time.**

**(iv) THAT the Respondent got married to one AF and they have two children namely M.A and M.A and she cannot be married twice as the same amounts to bigamy.**

**(v) THAT the Respondent lacks legal capacity and has no locus standi to raise an objection and to bar the Appellant from contracting a monogamous marriage.**

7. The Respondent stated in her submissions as follows:

**(i) THAT the Appellant and the Respondent had consistently lived together for 14 years and sired two children and further that they jointly built a home at Ndooni.**

**(ii) THAT the witnesses Dw1 and Dw3 testified about the relationship and Pw 1 an uncle of the Appellant also said in cross examination that he met the Respondent at the Appellant's home.**

**(iii) THAT the Learned Magistrate properly held that the Appellant and the Respondent were legally married under common law on the strength of the evidence before her and further that the Appellant married E under customary law and therefore their marriage was polygamous.**

**(iv) THAT it is trite law that the burden of proof lies with the party disputing the presumption of marriage and further that the Appellant did not rebut the same.**

**(v) THAT the marriage Act does not apply in this case as the Appellant and the Respondent started living together before the marriage Act 2014 came into operation.**

**(vi) THAT the Appellant has no capacity to contract a statutory marriage since he has a polygamous marriage and the same cannot be converted into a monogamous union.**

8. The first duty of the 1<sup>st</sup> appellate Court is to re-evaluate the evidence adduced before the Magistrate's Court and to arrive at its own conclusion.

9. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

*"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya vs. Republic (1957) EA. (336)**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (**Shantilal M. Ruwala Vs. R. (1957) EA. 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see **Peters vs. Sunday Post [1958] E.A 424**."*

10. I find that the Court found that there was long cohabitation between the Appellant and the Respondent for a period of 14 years and that the couple had two children.

11. The Appellant does not dispute the paternity of the two children. He stated that the Respondent is married to one AF and they have two children.

12. However, that evidence was not before the Magistrate's Court and the Appellant cannot adduce new evidence at appellate stage.

13. I find that the Magistrate was right in raising a presumption of marriage on the grounds of their cohabitation and on the strength of evidence that the Appellant and Respondent held out each other as husband and wife.

14. The Magistrate also said the Appellant has to dissolve the said marriage before he can convert his marriage to a monogamous union.

15. I find that the appeal herein lacks in merit and the same is dismissed.

16. Each party to bear its own costs of the appeal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**