



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.65 OF 2017**

**BETWEEN**

**J F B.....APPELLANT**

**AND**

**M O O.....1<sup>ST</sup> RESPONDENT**

**GENDIA ADVENTIS HOSPITAL.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the judgment of the SRM's Court at Oyugis in Civil Case No.206 of 2017 dated 13/11/2017 – Hon. J.S. Wesonga, SRM)**

**JUDGMENT**

1. The appellant **J F B** lived with **L A B** (Deceased) as husband and wife having married under Luo Custom in the year 1996. However in the year 2014, the deceased deserted their matrimonial home and eloped with **M O O** (1<sup>ST</sup> Respondent).

2. The appellant and the deceased had 4 children namely:-

- **B O 18 years;**
- **B O 8 years**
- **J O 5 years**

3. In October 2017, **L** fell sick and succumbed to her illness. Her remains were taken to **GENDIA ADVENTIST HOSPITAL** (2<sup>nd</sup> Respondent) by the 1<sup>st</sup> Respondent.

4. Upon learning of her death, the appellant went to collect her body for burial but the Hospital management declined to release the body, insisting that the people who took the remains there had to be involved.

He thus sought an order to compel the hospital to release the deceased's body to him saying she was legally his wife, who had merely gone on a prolonged visit to the 1<sup>st</sup> Respondent.

5. The 1<sup>st</sup> respondent opposed this request saying there was no marriage between the appellant and deceased, as the pair had merely cohabited and a presumption of marriage was not a status recognized under Luo custom. He denied taking the deceased's body to the hospital mortuary, saying she fell sick and was admitted there. The appellant was informed about her admission by his elder son **B O** but he never took any responsibilities until the deceased succumbed.

6. The 1<sup>st</sup> respondent maintained that he first married the deceased in 1993 and were blessed with two children, namely 17 year old **B O**. Then again in 2014 he remarried the deceased under Christian Marriage Act and they got **B A O** in 2015.

The claim is thus termed as frivolous, and incompetent and **L**'s body should be released to him for burial. He prays that the appellant be condemned to pay costs of preservation of the deceased's remains.

7. At the trial, the appellant insisted that they separated with the deceased in the year 2016 when she went to live with her aunt – they had lived together for 20 years from 1996. However he stated:-

**“Later I learnt that she got married to O O.”**

It was his evidence that when she deserted the matrimonial home, she took the children with her, and he made a report to police vide **OB 45/2/2015**, and police helped him to get back the children.

8. The appellant denied claims that prior to their marriage, the deceased had been married to 1<sup>st</sup> Respondent. He testified that he paid 2 heads of cattle as dowry for the deceased and she never divorced him – just deserted. He presented a letter from the area chief confirming that they were married and although he claimed to have fathered B O, he said he could not prove it.

9. On cross examination and re-examination, the appellant clarified that the deceased deserted the matrimonial home in the year 2015, and since then, until her death, they had not lived together.

10. The appellant’s brother **S O B** (PW2) confirmed that the appellant and the deceased married in the year 1996 and dowry was paid in 1998 in the form of 2 heads of cattle.

It was his evidence that the deceased deserted the matrimonial home in the year 2015. He too, was not aware of the deceased’s earlier marriage to the 1<sup>st</sup> respondent.

11. This was the exact narrative given by the appellant’s step brother **J A B** (PW3). He urges the court to allow the appellant to bury deceased saying:-

**“Under Luo Custom, if she is buried somewhere else she will haunt my brother and her children.”**

He also confirmed that after deceased left the home, B followed her and went to live with her.

12. On cross examination the witness stated that efforts to woo the deceased back to the appellant failed and he stated:-

**“She refused to come back and said she was going back where we found her.”**

13. Senior Chief **JOHN NDIGA AKADO** of East Kanyada location also testified that the appellant had reported to him of his intention to pay dowry and the deceased separated for years prior to her death. He was also aware of the deceased’s desertion of the matrimonial home and the disappearance of the children, because the same was reported to him. It was also his contention that since dowry was not refunded, then the deceased remained a wife to the appellant.

14. **JOSEPH OTIENO** (PW5) the children’s officer Homa Bay sub county confirmed that upon receiving a report from the appellant regarding the disappearance of the children, he had discussion with the couple. The deceased was accompanied by the 1<sup>st</sup> respondent, and in the best interest of the children he gave the appellant custody because the deceased kept shuttling between the 1<sup>st</sup> respondent and appellant whom he considered to be their biological father.

15. However the 1<sup>st</sup> respondent was adamant that he first married **L** in 1996 and he paid one cow as dowry. However in 1995 **L** deserted him and remarried in 2015 and told him she had been married to the appellant – infact he knew that for the 15 years that they were apart, she was married to someone else and that she did not file any proceedings against the appellant.

16. He solemnized his re-union with the deceased and was issued with a Marriage Certificate (**D. Exhibit 1**). He insisted he was the father to B O and from their re-union they begot **B A** aged 2 years 2 months.

17. His cousin **C O N** (DW2) stated that 1<sup>st</sup> respondent married the deceased in year 2015 and dowry was paid. He first got to know the deceased on 15/2/2015, and he had never known about B until the later started to go to school with his child.

18. **A A N** (DW3) the 1<sup>st</sup> respondent’s sister in-law told the trial court that the deceased lived with the 1<sup>st</sup> respondent for 2 years then left while expecting her first child in 1995. She subsequently returned in 2015 and informed them that she had been married in Kanyada and had children, although her husband (1<sup>st</sup> respondent) never paid dowry. The deceased also left the children and DW3 found it strange because under Luo custom, if dowry has not been paid then the woman leaves with the children.

19. The deceased’s brother **D O A** (DW4) confirmed the 1<sup>st</sup> respondent, saying his late sister got married to respondent in 1993 then after 2 – 3 years she left. The deceased’s dowry was not refunded and he stated:-

**“... I only recognize M O O as her husband. He is the only one who came home to introduce himself. And he is the one who had ensured that my sister was treated.”**

20. The trial magistrate noted that evidence on record supported the fact that the deceased and the appellant contracted a Luo customary marriage complete with payment of dowry, and the union realized 4 issues. However she deserted that set up in the year 2014, and contracted a Luo customary marriage with the 1<sup>st</sup> respondent before solemnizing it in church and they were issued with a marriage certificate.

21. Drawing from Cotran's text on Restatement of African Law Vol. 1 at page 179, the trial magistrate observed that under Luo Custom, one of the grounds upon which divorce can be granted is wilful desertion. Further that although the report to bury the body of a married woman ordinarily vests in her husband, this right is not absolute.
22. The trial magistrate noted that the appellant never made any effort to reconcile with the deceased after the separation and had no interest in her life during her absence and illness.
23. In her view that was not the conduct of someone who cared about the deceased and this was sufficient to rid the appellant of the right to bury the deceased.
24. She held that the respondent having wedded the deceased was the first person in line of duty in relation to her burial and was the lawful husband, having married under statute, which thus defeated her earlier marriage to the appellant, and dismissed the appellant's prayers.
25. The findings are now contested on grounds that the trial magistrate erred in holding that the marriage between the 1<sup>st</sup> respondent and the deceased was valid yet the appellant had paid dowry to her family, and which was never returned, so the union remained valid.
26. The appeal was canvassed through written submissions, where the appellant's counsel Mr. Osoro argued that the deceased and the appellant were bound by Luo Custom under which they had married.
27. Further that the fact of the child whom they begot remains in the appellant's home and informing appellant of the death was a demonstration that even their off spring knew that the deceased belonged to the appellant.
28. Counsel submitted that the deceased was married to the appellant for 15 years and the two did not divorce, so any subsequent marriage which the deceased contracted was illegal since there was no refund of dowry.
29. Counsel faulted the trial magistrate for referring to a past decision which related to Kikuyu Custom yet African Customs and rules are not universal and a second marriage is never recognized under Luo Custom unless dowry is refunded. Counsel argues that by deceased running away from the appellant and getting married to the 1<sup>st</sup> respondent, she committed adultery.
30. The respondent's counsel submitted that the union between the respondent was celebrated in accordance with the Marriage Act 2014, and the appellant never raised any objection as contemplated by Section 19 of the said Act. That the appellant elected to keep quiet about that union and only showed up after the death, to claim the body.
31. Counsel also pointed out that under the Marriage Act all forms of marriages are required to be registered, so the registration of the union between deceased and 1<sup>st</sup> respondent takes priority over any past union.
32. The scenario here is a peculiar one – can one woman have two husbands simultaneously?
33. Apparently, the first marriage was to the 1<sup>st</sup> respondent in 1993 which lasted 2 years before the deceased walked with the arm of the appellant. The 1<sup>st</sup> respondent confirmed that he did not pay dowry then 17 years later, having lived with the appellant for just about that period, the deceased walked back into the arms of the 1<sup>st</sup> respondent who now paid dowry, then solemnized the union through a church wedding, and a certificate was issued.
34. Had the marriage to the appellant been dissolved – Section 69 of Marriage Act lists grounds for church in customary marriages. Certainly there was no formal divorce as dowry was never returned. Did the deceased have capacity to contract a subsequent marriage in the light of the earlier marriage.
35. On the face of it the answer would definitely be a reasonably No! However the deceased added a twist to it – she deserted the home and the appellant made no effort to get her back into the marriage. But how long was the desertion period? 2 years. Legally desertion is recognised as one of the modes of dissolving a union under Christian and Civil Marriages the recognised period is 3 years – Refer **Section 65 (c) and 66 of the Marriage Act**.
36. This therefore waters down the argument presented by the trial magistrate when drawing from Cotran's test and I will use the 3 year period as reasonable test.
37. In law for Christian and Civil Marriages and two years is too brief a period to qualify as desertion – even if the appellant made no effort to woo her back or check on her during her illness.
38. Consequently the deceased had no capacity under **Section 9 of the Marriage Act 2014** to contract a subsequent marriage as the earlier marriage to the appellant was still existing and the solemnized marriage must and is declared a nullity.
39. This then allows the one with the closest association as discussed in the case of **NJOROGE –VS- NJOROGE (2004) 1 KLR** to be the appellant ... and he has the right to bury her.
40. The judgment be and is hereby set aside and judgment is entered in favour of the appellant to collect the remains of **L A B** for interment from Gendia Adventist Hospital.

(2) The respondent shall bear the hospital costs.

(3) Each party shall bear its own costs of the appeal

**Delivered and dated this 19<sup>th</sup> day of March, 2018 at Homa Bay.**

**H.A. OMONDI**

**JUDGE**