



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMABAY

CIVIL APPEAL NO.28 OF 2017

H O.....APPELLANT

VERSUS

D O G.....RESPONDENT

(An appeal from the decision by M.O.Ongeri (PM) Mbita in

Mbita PMCC No 7 of 2017 delivered on 19th May 2017)

JUDGMENT

1. The appellant (**H O**) claim in the magistrate's court was centered on the African customary concerning the legal status of the relationship which existed between her deceased daughter **M B O** and the respondent **D O G** to the extent that would entitle the latter to bury the deceased.

a. The deceased who hails from the **Abagusii** community lived in **Migori County**, and worked as an administration police officer based at **MBITA**. She is survived by 3 children namely **E J, M S AND A Y G**. It was the appellant's contention that the deceased was not married to the respondent as he had not paid dowry, and as far as she knew he was a mere boyfriend. Upon the death of **M**, the appellant proposed to inter her remains at **SUNA EAST/WASWETA 1/3743** but the respondent could hear none of it, saying the deceased was his wife whom he intended to bury at his rural home in **Genga Sub – Location in Rangwe**.

She had sought for:

b. A permanent injunction to issue against the respondent from interring the remains of the late **M B O** at **GENGA** Sub – Location in **RANGWE**.

c. A declaration that the appellant is entitled to inter the remains of the deceased on **PLOT NO. SUNA EAST/WASWETA1/3743**

d. Cost of the suit

2. In the appellant's statement she stated that sometimes in the year 2012 around Christmas period the deceased, the respondent, the respondent's mother and father, and the respondent's child (Johakim Evans) visited her and the respondent gave her a cheque of 100,000 which was for entertainment expenses. She stated that it was not dowry as in Abagusii culture, dowry is paid differently and there were no customary rites performed hence her daughter was not married. It was her contention that when a Luo man marries a woman from the **Abagusii** community, it is the **Abagusii** culture which applies.

3. She further alleges that the respondent had conned the deceased Kshs. 350,000/- and when she intervened the respondent assaulted her. She attached copies of treatment note as exhibit of the treatment of the injuries she alleged to have sustained, inflicted by the respondent. Pw1 further testified that her daughter's employment record at Homa Bay Commandant's office show that her next of kin are her 3 children and not the respondent and her records at Pioneer Insurance shows that the next of kin are **C O AND J E**.

4. In cross examination, the appellant stated that the respondent sired with the deceased the third child but she not did know the father of the other two children. She confirmed that the respondent and the deceased lived together in the deceased's house and that she had seen documents where the deceased introduced the respondent to the employer as a friend. She denied attending a meeting that was held at the respondent's home at **ASUMBI** and maintained that the minutes alleged to have been taken there were fake.

5. **M N (PW2)**, the deceased uncle, stated that when a **Luo** man marries a woman from the **Abagusii** community, **Abagusii** customary law

applies. He explained that the steps towards payment of dowry involve people being sent for negotiation before dowry is paid. He further testified that on 7/1/17 they went to the respondent's home to request him to pay the dowry and he promised to go to the appellant home but he did not go.

6. On cross examination, **PW2** testified that they met at the respondent's home at 5.00pm, the area assistant chief participated in the meeting and they left around 10.00 pm. He stated that he did not know whether the deceased lived with another man.

7. **PW3 (J N O)** testified that the deceased was his niece and that under **Abagusii** customs the man first sends a young man to go and report his intention to marry in the woman's home, then the woman's family goes to the man's home to negotiate on dowry (which is a men's only affair), then the dowry is paid. At the time of negotiation the mother is given a sweater and the father (if not then an uncle) is given a hat. **PW3** stated that these rites were not performed by the respondent and that attempts to have the respondent fulfill these rites bore no fruit. He confirmed that they received an **SMS** written in Dholuo instructing them to go to **ASUMBI**, on arrival at **ASUMBI** they sent for the chief and that's when the assistant chief came and they had a discussion on marriage and welfare of the children. They were not in agreement about anything being written down and disowned copies of minutes the respondent sought to rely on saying that they were forged.

8. In cross examination, **PW3** stated that the first child is not the respondent's child and he relied on his certificate of birth where the father's name is not provided. He further stated that the appellant, as much as she lives in **MIGORI**, had not abandoned her **Abagusii** custom. He acknowledged the fact that some **Abagusii** traditions have been abandoned in this day and age. He stated that in the meeting at **ASUMBI** they agreed to meet on 13/1/17 at **MIGORI** and that the minutes were not signed.

9. **PW4** the deceased's brother testified that, on 28th December 2016 he received a call from the respondent informing him that the deceased was in dire need of blood transfusion and he sourced the blood from **AGA KHAN HOSPITAL KISUMU**. However the respondent failed to pick the blood and he also declined for him to donate his blood as he was a potential donor. Further on 29th December 2016 he was informed that his sister was dead, and claimed that the cause of the deceased death was negligence by the respondent. He insisted that the deceased marriage to the respondent was not finalized and as such they were just friends.

10. When **PIONEER INSURANCE COMPANY** called him to inform him that the respondent was at their offices claiming benefits of the deceased, he was asked to carry identification documents and that is when he learnt that he and **J E** were his late sister's next of kin. He read mischief on the part of respondent saying he appeared to be money oriented as he did not pay to transport the body to Kisumu and he is not ready to pay dowry.

11. In cross examination, he stated that they did not ask the respondent for the transportation of the deceased's body money and as much as he paid for post mortem and mortuary, the same was refunded to him. He did not know how long the deceased cohabited with the respondent; although he acknowledged that they went to **ASUMBI** after receiving a phone text message requesting them to do so. He too disowned the minutes saying they were fake.

12. The respondent insisted that he got married to the deceased on 22/12/2012 when he paid dowry to the appellant at her home in **MIGORI**. He was accompanied by **D O, J A** and **M P** and the deceased mother invited old men as well as the deceased brother **W**. He gave the deceased mother kshs.100,000 since she said she lives in town and would not therefore require animals. He then she added her kshs 30,000 for **Ayie**, gave the old men kshs.20, 000/- and kshs. 7000/- was given to the deceased brother.

13. He insisted that **J E** is his child and produced the Birth Certificate in respect of other two children to prove that they are his children. He further stated that the appellant was supposed to come to his home to collect the sufuria, sweater, walking stick, hat and 3 goats has is required in her custom but she had not done so. He filed in court the declaration of income dated 1/11/2015 in which the deceased declared him to be the husband.

14. He also pointed out that the deceased referred to him as her husband in many occasions such as insurance cover beneficiaries' nomination form with **PIONEER INSURANCE**, as contributor of **NHIF (NHIF membership data summary)**, staff head count and they swore an affidavit of marriage on 24/6/2013.

15. He added that when the deceased was expectant and went to deliver on 27/12/2016, that he drove her to **AVENUE HOSPITAL, KISUMU** personally-accompanied by his sister. Unfortunately, the deceased and their child died on 29/12/2016 and he took the body of the deceased to Star hospital then moved it to **KIRINDO** mortuary. He never proceeded to bury his wife as the court injunction was placed by the appellant.

16. He also stated that there was no evidence showing deceased intended to divorce him; and that he is with their children, nor did he leave **J E** with the appellant.

17. He insisted that the meeting in his home at **ASUMBI** on 7/1/2017 was to discuss the dowry, reconciliation, and their children's welfare. He avers that the people present at the meeting recognized there was a relationship; the meeting was at his home inside the deceased house.

18. In cross examination, he stated that a cheque of kshs100, 000 was given to the appellant instead of cows and the other things that the appellant demanded she was to pick them from his home. He further stated that a man from Luo marries according to Luo customary law and there was no way he could have married under **Abagusii** custom- only that he accommodated some of his in-laws cultural preferences.

19. He further stated that it is an abomination to touch his mother in law, so he could not have assaulted the appellant.

20. **DW2 (AP QUINTER ACHIEN'G KAOGA)** employed by National Police Service attached in **KENDU BAY**, testified that the deceased was her friend and that the only man she introduced to her as the husband was the respondent with whom she had children

21. In cross examination she stated that she had visited the deceased and the respondent at their home.

22. **DW3 (ONYANGO CHRISPIN)**, the assistant chief of **GENGO** sub location met 4 visitors on 7/1/2017 and accompanied them to the respondent's home where they had a meeting. He noted the names of the people present and gave the list to the respondent as well as the minutes. He further stated that they agreed to visit **MIGORI** on 13/1/17. In cross examination he confirmed that it was within his knowledge that the respondent was married to the deceased.

23. **D O O (Dw4)** a cousin to the respondent, confirmed being present at the meeting on 7/1/2017 and that minutes were recorded. He further stated that he knew the deceased as the respondent's wife. In cross examination he stated that he did not attend the meeting at **MIGORI** because they were busy preparing for the funeral.

24. The trial magistrate held that the Luo and Gusii community have a common custom of payment of dowry, the difference is the parties' practices on how the dowry is negotiated and paid. The parties did not call any expert witnesses on these customary practices and they both had relatives who were definitely biased. He cited the case of **VIRGINIA EDITH WAMBUI –VS- JOASH OCHIENG OUGO AND ANO [1987]eKLR** to emphasize the significance of dowry in African communities saying it must be recognized as a token of appreciation for taking care of the woman being married. The trial magistrate was however not able to determine whether in this present case dowry was paid

25. He was however persuaded that since there was evidence that the parties had cohabited since the year 2012, and even had children as a result of that relationship; coupled with the deceased's own conduct of openly acknowledging the respondent as her husband, then there was a presumption that they were married. Consequently he held that the respondent was entitled to bury the remains of his wife. He however directed each party to bear its own costs and share the mortuary fees equally.

26. The appellant contested the findings on grounds that the trial court failed to consider that the appellant had proved her case on a balance of probabilities. Further that the trial court failed to evaluate the evidence presented, yet the respondent's evidence was contradictory and irrelevant.

27. The respondent filed grounds of opposition to the appeal as well as a cross appeal contesting the sharing of the mortuary fees as unjust since it was the appellant who had initiated the litigation.

28. The appeal was canvassed by way of written submissions. The appellant is adamant that the respondent did not pay dowry according to the Gusii custom since he did not perform all the rites required of the Gusii customary marriage law. As such, he cannot be said to have married the deceased. Therefore, the deceased does not have a matrimonial home and her remains ought to be handed over to her mother to inter. Counsel submitted that the respondent did not marry even in accordance with Luo customary marriage law.

29. It was further submitted that the evidence by **MICHAEL NYAKUNDI (PW3)** could have brought this matter to rest had the trial court considered it as it elaborated the Abugusii customary rites on marriage. It was contended that the trial court arrived at the right decision by ordering each part to pay its costs and that the cross appeal should be dismissed and the appeal be allowed. The court was urged to rely on the case of **SHEM NAVADE VS. PETER IRUNGU KAMAKIA (2009) ECLR** in their submissions.

30. On the other hand, the respondent's counsel maintained that he married the deceased and he provided evidence to this effect. As such he has the right to bury his wife.

31. He relied on section **3(3) of the Marriage Act No.4 of 2014** which recognises customary marriages, emphasizing that the requirement under the Act that all marriages must be registered grants security even to customary marriages, but in so doing, diminishes the significance of dowry as a determinant to its legality. Counsel also pointed out to the provisions of section **43(2)** of the said Act which explains that where the payment of dowry is required to prove marriage under customary law the payment of a token under customary law is sufficient proof of a customary marriage. Therefore, he urged the court to find that the Kshs 100,000/- given to the appellant constituted, and ought to be interpreted as partial payment amounts to full payments of the contemplated dowry.

32. He relied on the case of **NJAU AND ANOTHER VS. WAHITO (2008) ECLR** to argue that even without the dowry issue there is a legal and valid basis for presuming that the respondent and the deceased were married stating that overriding presumption cuts across all formal processes of marriage.

33. In regards to costs they submitted that the court did not have good reason as to why they departed in awarding "costs from general rule that costs follow the events" and invited the court to bear in mind the various steps taken by parties in the case so as to appreciate the trouble taken by both parties since the suit was filed. He concluded by stating that the court should enter judgment in favor of the respondent/cross appellant.

ISSUES TO BE DETERMINED

- a. Whether the custom applicable is the Luo or Gusii customary marriage when marrying a Gusii woman
- b. Whether the respondent paid dowry to the appellant according to either of the customs applicable
- c. whether the marriage between the applicant's daughter and the respondent can be presumed
- d. Whether the costs of the mortuary fee and this suit is to be shared between the parties

ANALYSIS OF THE ISSUES TO BE DETERMINE

Application of customary law

34. It is not in contention that parties herein subscribed to marriage under African custom. What is in contention is which customary marriage as they belong to different tribes. The appellant is of the view that the customary marriage applicable between the respondent and her late daughter is the Gusii customary marriage while the respondent is of the view that the customary marriage applicable between him and the applicant late daughter is Luo customary marriage.

35. Article 2 (4) of the Constitution of Kenya recognizes the application of customary law, but with a limitation and it provides:

“Any law, including customary law, that is inconsistent with this Constitution, is void to the extent of this inconsistency....”

36. Section 3 (2) of the Judicature Act, chapter 8 of the Laws of Kenya, acknowledges customary law as a system of marriage in Kenya. The said section provides as follows:

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure sand without undue delay.

37. Section 43 of the Marriage Act, No.4 of 2014 provides that

43 (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.

38. The above provision is clear that both or any customary marriage requirement of either culture is applicable. It further provides that token amount of dowry shall suffice to prove customary marriage.

Whether the respondent paid dowry to the appellant according to either of the customs applicable

39. The appellant maintained that the respondent ought to know dowry is normally paid in form of domestic animal, and the fact that the respondent did not do that he cannot claim to have paid dowry under whichever customary marriage. On the other hand, the respondent insisted he paid dowry in form of cheque of kshs.100, 000/= as the appellant told him that she lived in town, and was not interested in animals. The appellant did not refute the fact that she received this money but said that it was for entertainment expenses. What entertainment?

40. I am inclined to the fact that the cheque that the respondent gave to the appellant was made instead of the animals. The respondent tried to comply with the Luo customary marriage as well as the Abagusii one but he had not completed traditional fulfillments which required that the appellant receives hats, goats among others things from him. In my view he falls within what is contemplated by **Section 43 (2)** of the **Marriage Act**-partial fulfillment of dowry rites and that would give his relationship legal recognition.

Whether the marriage between the appellant’s daughter and the respondent can be presumed

41. The evidence proves that the respondent and the deceased cohabited and conducted their affairs as husband and wife; it further shows that they had children together. **IN THE MATTER OF THE ESTATE OF ISAAC GIDRAPH NJUGUNA MUKURURO (DECEASED) [2013] eKLR** the case of **HOTTENSIAH WANJIKU YAWE VS. PUBLIC TRUSTEE C.A 13 OF 76** it was held that along cohabitation as man and wife gives rise to presumption of marriage and only cogent evidence to the contrary could rebut such a presumption.

42. Indeed Ojwang, J (as he then was) put it very succinctly in the case of **NJAU AND ANOTHER –VS- WAHITO [2008] eKLR**:

“...the principle of this decision is that the overriding presumption may cut across all formal processes of marriage, whether they be statutory, ecclesiastical, or customary, and by this principle, marriage existing defects, whereby a man and woman simply cohabit”

43. This position is supported by the decision the appellant’s counsel cited in **SHEM NAVADE ASULUDA –VS- PETER IRUNGU KAMAKIA** in which Nambuye, J (as she then was) held that there was sufficient evidence to establish the existence of presumption of marriage between the deceased and the defendant.

44. The Parties by their cohabitation and conduct constituted a presumption of marriage. Consequently the trial magistrate did not err in finding that the conduct of the parties constituted a presumption of marriage.

Whether the costs of the mortuary fee and cost of this suit is to be shared between the parties

45. The trial court exercised its discretion and ordered that both parties should bear their costs; **Section 27 (1)** of the **Civil Procedure Act, chapter 21** of the **Laws of Kenya** provides as follows;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes foresaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

46. But what was the basis for the exercise of this discretion? The case of **CECILIA KARURU NGAYU V BARCLAYS BANK OF KENYA & ANOTHER [2016] EKLK** illustrates that as much as the court has discretion to award costs the same should be exercised judiciously, because normally the costs should follow the events; departure from that calls for good grounds of doing so.

47. As a matter of fact, the appellant filed this suit to stop the respondent from interring the remains of his wife. The said delay as it is known to both parties resulted to financial as well as emotional drain. The appellant lost the case, however each party was ordered to bear their own costs.

48. In the case of **SHEM NAVADE ASULUDA** (supra) the court ordered that:

“ ...the party who necessitated the proceedings is the defendant and he is ordered to pay costs and mortuary charges.”

49. I share the same approach as Nambuye J - in my view the costs should have been awarded to the respondent and to that extent the order regarding sharing of costs is vacated. The appellant shall bear the costs of the suit in the lower court and also the mortuary charges. In the alternative, the respondent do pay the mortuary charges to facilitate the removal of the body of **MAUREEN BWARI OMWOYO** to enable him conduct the burial, and then commence another civil suit to recover the expenses if he so desires

50. The appeal is thus dismissed and the cross appeal is allowed. The appellant shall bear the costs of this appeal

Delivered and dated this 23rd day of November, 2017 at Homa Bay

H.A.OMONDI

JUDGE