REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.137 OF 2014

VINCENT ALIERO AYUMBA.....APPELLANT

VERSUS

LIVINGSTONE ESHIKURI LIAKAYI.....1ST RESPONDENT

YVONNE KHALECHI ODAWA.....2ND RESPONDENT

ANDREW ODAWA.....3RD RESPONDENT

(Appeal from the judgment of Hon* S.N. Mwangi*, Ag. SRM in Vihiga Civil Suit No.47 of 2014 delivered on 13th November, 2014)

JUDGMENT

1. This is an appeal from Ag.SRM Vihiga where the trial magistrate dismissed the appellant's suit with costs to the respondents. The appellant was dissatisfied with the judgment of the lower court and has filed this appeal raising the grounds that:-

> **(1) The trial magistrate erred in law and fact by failing to consider the overwhelming evidence tendered in court by the plaintiff.**
>
> **(2) The trial magistrate misdirected herself on the issue of presumption of marriage.**
>
> **(3) The trial magistrate erred in law and fact by failing to consider the fact that the plaintiff and deceased had established their matrimonial home at Kiminini Kapkoi.**
>
> **(4) The trial magistrate erred in law and fact by failing to consider that stay was and is mandatory.**
>
> **(5) The trial magistrate erred in law and fact by failing to evaluate the fact that the defendant indeed accepted a token in conformity with the Marriage Act and the Constitution of Kenya 2010.**
>
> **(6) The trial magistrate failed to consider the fact that the respondents failed to rebute the evidence to the contrary as to the evidence by the plaintiff.**

2. In the lower court, the appellant had sued the respondents seeking for the following orders:-

> **(1) A permanent injunction do issue against the defendants, their agents and/or persons acting from their authority from burying the body of the late Grace Liakayi and the same be buried at Kiminini/Kapkoi Sisal Block '2'/Waumini 'B'/270.**
>
> **(2) That this Honourable Court do find that the plaintiff and the late Grace Liakayi were husband and wife.**
>
> **(3) That cost and interest thereof be provided.**

3. The 1st respondent herein is the father to the deceased while the 2nd respondent is a daughter to the deceased. The appellant works as a policeman in the Republic of Kenya.

The appellant contends that he was living with the deceased as man and wife before the deceased died in June 2014. The appellant is a Maragoli while the deceased was a Munyore both of which are sub tribes of the Luhya tribe. The appellant contends that he started cohabiting with the deceased in the year 2004. That at the time that he met her, she had a daughter, the 2nd respondent who was in school at

Mudasa Academy. That by the time that the deceased died in 2014 he and the deceased had cohabited for 10 years. That the deceased used to move with him to the various police stations that he was transferred to within the country. That he had in the year 2008 visited the parents of the deceased and gave them a token of Kshs.8,000/-. He says that the token paid legalised the marriage between him and the deceased.

4. That besides that he and the deceased had bought a parcel of land at ***Wamuini*** in Kitale that was registered in their joint names. They have built a house there and that they had followed the Luhya customary laws in building the house. Further that they had constructed a house at ***Lucky Summer*** estate in Nairobi where they used to reside. That he had taken a medical cover wherein the deceased was indicated as a beneficiary. That when the second respondent was in school, he used to visit her as a parent. That he had been paying her school and college fees. That he used to attend family events together with the deceased and the deceased was identified as his wife. That his friends knew her as his wife. That they even used to take joint loans together. That they have built houses for rent and used to run family businesses together. That when the deceased started ailing in Nairobi he was stationed at Malindi. Her family moved her to her father's home in ***Bunyore*** where she succumbed to death. He paid mortuary fees amounting to Kshs.43,500/-. Her family refused to hand him the body for burial at their Kitale home. He filed this suit. He contends that he is the one who has the right to bury the deceased.

5. In their statement of defence the 1st and 2nd respondents pleaded that the appellant did not pay dowry in accordance with Luhya Customary demands and neither was there dowry negotiations. In the alternative they pleaded that the act of the deceased and the plaintiff owning land in joint names and the fact of the deceased being included in the medical scheme of the appellant did not create marriage in law. They contended that they have the right to bury the deceased.

6. In his evidence in court the 1st defendant admitted that the appellant and some people visited his home and gave a token of Kshs.8000/- but insisted that it was not payment for dowry as there were no dowry negotiations on the date of the visit. He maintained that there was no dowry paid as a consequence of which there was no marriage between the appellant and the deceased. He pleaded with the court to release the body to him for burial.

7. The 2nd defendant stated that the appellant was not married to her mother. That she never met him at their ***Lucky Summer*** estate home. That she only met him once at ***Menelik Hospital*** in June 2014 when her mother was admitted in hospital. She denied that the appellant used to make visits to her when she was in school.

8. The trial magistrate found that there was no dowry paid in accordance with ***Bunyore*** or ***Maragoli*** customary law and as such there was no marriage between the appellant and the deceased. She found that there was no evidence placed before the curt to raise a presumption of marriage between the appellant and the deceased. In the premises the trial magistrate dismissed the suit by the appellant.

SUBMISSIONS BY ADVOCATES:

Submissions by Advocates for appellant:

9. The submissions by the advocate for the appellant were based on two issues – that the trial court erred in failing to consider that dowry was paid in form of a token in accordance with Luhya Customary law and secondly that the trial magistrate erred on the issue of presumption of marriage.

The issue of dowry:-

10. The advocate relied on ***section 45(2)*** of the ***Marriage Act 2014*** that provides that:-

> ***"Dowry means any token of any stock, goods, moneys, or other property given or promised in consideration of an intended marriage."***

The advocate submitted that the learned trial magistrate erred in fact and in law by failing to consider that the token offered by the appellant to the deceased's parents was a form of dowry.

Presumption of marriage:-

11. The advocate submitted that the fact that the deceased had listed the appellant as a beneficiary under his medical cover as a spouse, the reasonable conclusion is that the two were man and wife.

12. The advocate submitted that the fact that the appellant and the deceased owned land jointly in ***Kitale*** proved that the two were not just mere acquaintances but were a married couple. That the two had established a home on the land in accordance with Maragoli customs which proves that marriage existed. A matrimonial home cannot exist where there is no marriage.

Further that the appellant called witnesses including his grandfather, PW2 and friends who attested to the marriage.

Further that the fact that the appellant paid mortuary expenses supported presumption that the deceased was his wife.

13. On whether the court should invoke the principle of presumption of marriage the advocates cited the cases of ***Hostensiah Wanjiku Yawe vs Public Trustees EACA C.A. No.13 of 1976 (UR)*** and ***Chistopher Nderi Gathambo & Samuel Muthui Munene vs Samuel Muthui Munene*** (2003) eKLR. In the latter case the Court of Appeal held that a presumption of marriage is part of Kenyan law and is applicable in any marriage including customary marriage.

Submissions by advocates for the 1st and 2nd respondents:-

14. The advocates for the 1st and 2nd respondents submitted that for there to have been a marriage under Luhya (***Bunyore***) customs, there must have been dowry negotiations and subsequent payment of the same which in this case never happened. That the token that the appellant paid is not a condition of a marriage under Luhya customs. Further that the mere fact of staying together as husband and wife does not amount to marriage under Luhya customary law. That the appellant did not call any independent witnesses to prove the issue of presumption of marriage.

Duty of first appellate court:-

15. This is a first appeal. It is the duty of a first appellate court to re-examine, re-evaluate the evidence and draw its own conclusions bearing in mind that it did not see and hear the witnesses testify – see ***Selle & Another vs Associated Motor Boat Company Limited*** (1968) EA 123.

Questions for determination:

16. The questions for determination are:-

(1) Whether the deceased was married to the appellant in accordance with Luhya (*Bunyore*) customary law.

(2) Whether presumption of marriage is applicable in the circumstances of the case.

The issue in this case is as to who between the appellant and the respondents have the right to bury the deceased. Ojwang J in the case of ***Ruth Wanjiru Njoroge vs Jemimah Njeri Njoroge & Another*** (2004) eKLR held that the person closest to the deceased in legal terms is the person who has the right to bury a deceased person. The learned Judge said:-

> ***"In social context prevailing in this country, the person who is in the first line in relation to the burial of any deceased person, is the one who is close to the deceased in legal terms. Generally the marital union will be found to be the focus of the closest chain of relationships touching on the deceased. And therefore, it is only natural the one who can prove this fundamental proximity in law to the deceased, has the colour of right of burial, ahead of any other claimant."***

Did the appellant then prove that he was married to the deceased so as to accord him the right to bury her body?

The issue of dowry:

17. Witnesses for both parties called witnesses who were well versed with Luhya Customary law. On the side of the appellant was his 85 year old grandfather, PW2 and his customary law advisor PW3. John Kamula aged 57 also added to the evidence. On the side of the respondent was a preacher with Church of God in East Africa, 60 year old Jerald, DW5. The three stated witnesses for the appellant are maragolis and the stated witness for the respondents is a munyore. There was not much difference in what they stated in their evidence between maragoli and nyore marriage customary laws. It was agreed by all these witnesses that before there is a valid Luhya Customary marriage, there has to be payment of dowry. It was agreed tht dowry payment has to be proceeded by dowry negotiations between the families of the two parties. That dowry agreed upon is written down. It was further agreed tht dowry cannot be paid before the negotiations. It was also agreed that when a man is interested with a lady he is required to first visit the parents of the lady and introduce himself to the parents. That in the first visit he can carry a gift/present to the parents of the girl but this is not dowry.

18. The appellant's advisor PW3 stated that if a man has been staying with a lady and the lady dies before he has paid the dowry, it is the father of the lady who has a right to bury her. However that the two families can still negotiate over the dowry and if they agree the man can be allowed to bury the body of the lady.

19. In his book ***Restatement of African Customary Law, The Law of marriage and Divorce Vol.1 Eugene Cotran at page 53*** mentions the essentials of a valid Luhya marriage as:-

- Capacity to marry

- Consent by parties to the marriage and their respective families

- Payment of dowry

- Cohabitation

Mr Contran states that there can be no valid Luhya marriage unless bukhwi (dowry) has been paid. The dowry has to be negotiated between the families and can be paid by cattle or by money and can be paid by installments commencing before the marriage and continue afterwards. The witnesses who testified in this case propounded the ingredients of a Luhya marriage as set out in the above said book.

20. Though the appellant contended that what he gave the parents on his introductory visit was dowry, this was disputed even by his own witnesses who said that that was a gift to the parents of the lady and does not amount to dowry. Besides there were no elders or other relatives when the appellant went for the visit. The trial court correctly found that the payment of Kshs.8,000/- was only a gift to the

deceased's parents and did not amount to dowry as dowry negotiations had not taken place.

21. From the evidence adduced before the court and upon consideration of the essentials of marriage as contained in ***The Restatement of African Customary law***, I find that the learned trial magistrate was correct in holding that there was no dowry paid by the appellant to the family of the deceased. There was thereby no customary marriage between the parties. In the premises it is the 1st respondent who had the right to bury the deceased in case of death unless the parties could consequently agree on payment of dowry. There was no such agreement between the parties. The 1st respondent thereby retained the right to bury his daughter

22. The issue of presumption of marriage:

The appellant alleged that he had cohabited with the deceased for a period of 10 years and therefore that the presumption of marriage was applicable in the circumstances of the case. That the presumption was supported by the fact that they had built a home at their ***Wamuini*** Kitale whose title deed was in their joint names. That the Luhya customary laws were followed when building the house. His grandfather PW2 blessed the house as their matrimonial home. Therefore that they had set up the place as their matrimonial home. That that is where the deceased should be buried.

23. The trial court dismissed imputation of presumption of marriage on the grounds that there was no proof that the appellant and the deceased used to live together, that the 2nd respondent only met the appellant when her mother was sick in hospital, that there was no proof that the appellant used to pay school fees for the 2nd respondent, that there were no children of the marriage, that no family photographs were produced to prove that the two used to live together and that when the deceased was ailing in hospital there was no evidence that the appellant attended to her as a spouse. The trial magistrate held that the act of joint ownership of land is not sufficient proof that the two were married.

24. The appellant called witnesses who testified that they knew the deceased as the appellant's wife. His mother PW6 testified that she knew the deceased as the wife to the appellant. A colleague policeman to the appellant PW7 also testified that he knew the deceased as the wife to the appellant. That when the deceased was on leave she used to visit the appellant at ***Malindi*** when he was stationed there. That he once visited them in their ***Kitale*** home where they had built a house. He also visited them in their Nairobi ***Lucky Summer*** estate house.

25. PW3 also stated that he knew the deceased as wife to the appellant. That he had met her at Serem police station when the appellant was stationed there. He also met her at Vihiga police station when the appellant was transferred there. PW4, a construction foreman said that the appellant is a close friend to him. He is one of the people who escorted the appellant to pay a visit to the parents of the deceased. He testified that he has known the parties and that he has visited them at the Kitale home and ***Lucky Summer*** estate home in Nairobi.

26. According to the ***Halsbury's Laws of England, 3rd Edition vol.19 at para.1323*** the presumption of marriage from cohabitation is imputed where a man and a woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation being a man and a wife, a lawful marriage may be presumed though there may be no positive evidence of any marriage having taken place, and the presumption can only be rebutted by only strong and weighty evidence to the contrary.

27. In ***Njoki vs Muthero (1985) KLR 487***, ***Nyarangi, JA*** (as he then was) stated that:-

> ***"In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute."***

28. In the case of ***Mary Wanjiru Githatu vs Esther Wanjiru Kiarie, C.A. Civil Case No.20 of 2009*** (Eldoret) cited in ***Milena Bora vs Liana Tamburelli*** (2016) eKLR, ***Bosire JA*** (as he then was) stated that:-

> ***"In the circumstances where parties do not lack capacity to marry, a marriage may be presumed if the fact and circumstances show the parties by long cohabitation or other circumstances evidenced an intention of living together as husband and wife."***

The question then is whether from the circumstances of this case there was long cohabitation between appellant and the deceased which evidenced an intention of living together as husband and wife.

29. The appellant is a police officer. He testified that in the 10 years that he had known the deceased, the deceased had been moving with him to the various police stations to which he had been transferred across the country. However evidence was adduced that the deceased was working with ***Unilever*** Company in Nairobi. This thereby means that the deceased was not living with the appellant on a full time basis. The deceased could only visit him on weekends, when on leave or off duty. This was well captured by the evidence of the appellant's fellow police officer ***DW7*** who stated that the deceased used o visit the appellant at Malindi police station when she was on leave or off duty. Does then visiting a man over weekends, leave and off days make one a wife?

30. The appellant stated that when he was transferred to ***Kilimani Police Station in Nairobi***, he was living with the deceased at their Lucky Summer estate house in Baba Ndogo. Evidence was however led that the appellant had a house at the police station and he therefore could only have been visiting the deceased when he was off duty.

31. The appellant stressed that he and the deceased had bought land at ***Wamuini*** in Kitale where they had built a matrimonial home. The land is registered in the joint names of the appellant and the deceased. The appellant, his grandfather PW2 and the appellant's mother PW5 stated that PW2 had performed the traditional rites on the house when the house was being built. PW2 is a grandfather to the appellant on the appellant's mother's side of the family. The appellant admitted that he has other close relatives on the paternal side. Why then would he pick a grandfather from the maternal side to conduct such an important rite instead of picking one from the paternal side? Traditionally such

rites are conducted by the father or close relative from the paternal side. The evidence that PW2 conducted the rite is not credible. That therefore the appellant and the deceased had set up a matrimonial home at ***Wamuini*** was not proved. The only credible evidence is that they had bought land at the said place. That evidence was not sufficient enough to impute a presumption of marriage.

32. The appellant did not place any evidence before the court to prove that he had at any time paid school and college fees for the deceased's daughter, the 2nd respondent. He only stated that he used to give the money to the deceased to pay. There was nothing to support that contention.

33. The fact that the appellant had included the deceased in his medical cover does not prove marriage. This might have been out of convenience in catering for medical bills of a close friend.

34. The appellant stated that he used to attend family functions with the deceased. Nothing such as photographic evidence was produced in court to prove so.

35. In my analysis of the evidence, the appellant was only an intimate boyfriend to the deceased. There was no basis for the witnesses who testified to hold that the two were husband and wife. The fact of two people, a man and woman visiting each other and keeping each other company does not necessarily lead to the conclusion that the two are married. Such parties must expressly make their intentions known to the public, their friends and family members. In this modern age it has to be accepted that there are couples who just want to live together without any label of being man and wife. There are various reasons for these so called "***come-we-stay***" sort of relationships. The wishes of such people must be respected. If any party involved in such a relationship wants the court to impute the presumption of marriage, the person must adduce concrete evidence to prove so. In the case of ***NUFR vs MSC*** (2013) eKLR Musyoka, J. had the following to say on what has to be proved:

> ***"I need to emphasize that marriage creates a family, a basic and fundamental unit in society. Family brings with it immense obligations on all the parties involved. Marriage is a serious matter, and issues torching on it must be approached with appropriate caution. This therefore obliges a party who approaches a court to declare marriage out of reputation or prolonged cohabitation to marshal adequate and concrete evidence upon which the court can confidentially make the determination sought."***

36. I entirely agree with the learned judge on the issue. The appellant in this case has not adduced concrete evidence upon which the court can impute marriage out of long cohabitation. The trial court was thereby correct in holding that the appellant and the deceased were not married by long cohabitation. There were no grounds on which presumption marriage could be imputed.

In the foregoing there was no evidence that the appellant was married to the deceased either by customary law or by presumption of marriage. The trial magistrate was not in error to dismiss the case. The appeal is accordingly dismissed with costs to the 1st and 2nd respondents. The 3rd respondent had no role to play in the case and should meet his own costs.

Delivered, dated and signed at Kakamega this 11th day of December, 2017.

J. NJAGI

JUDGE

In the presence of:

Sakwa for appellant absent

Wekesa for 1st and 2nd respondents

Munoko for 3rd respondent

George court assistant

Appellant.....Present

1st respondent absent.....absent

2nd respondent present.....present

30 days right of appeal.