



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 80 OF 2015**

**S O.....APPELLANT**

**VERSUS**

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

**H N M.....2<sup>ND</sup> RESPONDENT**

**(Being an Appeal from the Judgment, Decree and Orders of the Chief Magistrate's Court  
(Milimani Commercial Courts) Nairobi in Civil Case No. 14 of 2015)**

**JUDGMENT**

1. The deceased S M M died on 27<sup>th</sup> December 2014 while undergoing treatment at the Aga Khan Hospital. The body is lying in a mortuary at the Hospital. At the time of the death, the deceased was living with the appellant at Buruburu Phase V, House No. 20. They had begun living together in 2003. The two had a daughter D O. Before this, the appellant was married to one Diana B O who passed on in 2000 leaving a daughter, O W. The deceased adopted this child and was staying with her when she died.
2. In 2010 the appellant secretly married one U under Muslim law. U is a Muslim. The two stay together in Kisumu. The deceased discovered this marriage in 2013 and was quite infuriated. This, however, was followed by a visit by the appellant and his kinsmen to the deceased's father's home in Taita. She was a Taita, and the appellant is a Kisii from Nyamira County.
3. Following the deceased's death, the appellant commenced burial arrangements. The deceased's brothers (the respondents) were also making similar arrangements. The former wanted to bury the deceased in Kitutu Masaba whereas the later wanted to bury the remains in Taita at her father's home. The respondents got the two sides to meet to be able to agree on burial place. The meetings were held between 1<sup>st</sup> January 2015 and 6<sup>th</sup> January 2015. On 7<sup>th</sup> January 2015 they were surprised when they read in the newspapers that the appellant was going to bury the deceased at Kitutu Masaba. On the same day they filed this suit at Milimani Chief Magistrate's Court seeking an injunction to restrain the appellant from burying the body of the deceased, and also an order seeking that they be allowed to bury the body at a place and on date of their choice. On 12<sup>th</sup> January 2015 the appellant filed a defence stating that the deceased was his wife whose body he was entitled to bury. He pleaded that:-

**“12. The defendant avers that as a husband of the deceased he had every right to plan and arrange for the burial of the deceased wife in accordance with Kisii customary law.**

**13. The defendant avers that his marriage to the deceased has been uninterrupted since the year 2003 up to the time of her demise until the plaintiffs and others began interfering with his plans and arrangement for her burial.”**

4. In the plaint, the respondents stated that at the time the deceased died, her relationship with the appellant had become strained; and that the appellant was staying in Nyanza where he had a construction company and was living with the Muslim woman whom he had married. The appellant’s case was that he was operating in Kisumu because his construction company had secured business in Western Kenya, but that he still came to Nairobi where his family was. His marriage to the Muslim woman was not disputed. His case was that he was in a polygamous arrangement.
5. It is on the basis of those pleadings that the respondents and the appellant testified and called witnesses. The court found that there was no valid marriage proved between the appellant and the deceased as no dowry had been paid in accordance with Taita custom. The court decided that the deceased be buried in a neutral place

**“where none of the parties in this matter will claim superior right.”**

The place ordered as the burial place was Langata Cemetery, Nairobi.

6. The appellant was aggrieved by the judgment and orders and appealed to this court. His case was that the court had erred in finding that there was no valid marriage between him and the deceased. Such marriage, he pleaded, was based under customary law, or was founded on the doctrine of presumption of marriage. Counsel for the parties filed written submissions on the appeal and relied on various decided cases.
7. This being a first appeal, this court is mindful of its duty to re-evaluate the evidence on record and come to its own conclusions, while keeping in mind that the trial court had the advantage of seeing and hearing the witnesses as they testified, observed their demeanour and assessed their credibility **(Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968]EA 123)**.
8. The question that engaged the mind of the trial court was whether a valid marriage, customary or otherwise, had been proved between the appellant and the deceased to entitle the former to bury the remains of the later. The court found that no valid marriage had been proved. The question for this court to determine is whether that finding was supported by the evidence and the law.
9. The factual position was that the deceased moved into the appellant’s house at Buruburu, Phase V, House No. [Particulars withheld] in 2003, and it was while still living here that she died on 27<sup>th</sup> December 2014. This cohabitation was for a period of 11 years. They got a child, a daughter, who was born in 2003. The appellant had another daughter from a previous marriage. The deceased accepted her and stayed with her. When she died he buried her in Kitutu Masaba. The deceased and her family members attended the burial. When the 2<sup>nd</sup> respondent testified, he stated that he first met the appellant in 1997. He was introduced to him by the deceased. In 2003 the two moved in together. In the plaint it was pleaded that at the time of the death of the deceased she had separated from the appellant. The reason being that the appellant had moved to Kisumu where he had married a Muslim woman. The evidence of the respondents was that the appellant had in 2010 secretly married the Muslim woman. The deceased did not discover until 2013. The deceased informed her family. This is what led the appellant and his kinsmen to visit Taita in the home of the deceased’s father. What happened in Taita is disputed. The respondents said that this was a discussion in which the appellant was asked to pay a fine for his errant way of

staying with someone's daughter without reporting. The appellant and his witnesses testified that they came to pay dowry. Whatever is the case, it is not disputed, the appellant and the deceased went back to continue to stay together.

10. The respondents called F S to testify for them. He is the brother to the deceased's mother. His evidence was that he was first introduced to the appellant in August 2005 as the deceased's friend. At the time, the deceased's father was critically ill. He advised the appellant to visit the deceased's people so that he could pay dowry and formalise the union with her. The appellant did not heed. In October 2005 the deceased's father died. The appellant and his kinsmen attended the burial in Taita. Both respondents testified that there was a time the aunties of the deceased visited the family of the appellant in Kisii. Further, the respondents testified that, although what happened when the appellant and his kinsmen visited Taita in 2013 was not dowry payment (or negotiation), the meeting opened the doors for dowry negotiations but this did not happen. During the visit money was exchanged. The appellant stated that he brought a list of things, and then a fine of Kshs.16,000/=. Previous to this, he had spent over kshs.100,000/= on the deceased father's hospital bills.

11. This is the evidence the respondents contended that that did not amount to dowry payment under Taita custom. The lower court acknowledged that the deceased and the appellant had lived together and cohabited for a long time. It stated as follows:-

**“I am however convinced that the period the defendant and the deceased lived together is of such significance that it cannot be wished away.”**

The appellant's evidence referred the trial court to decided cases that have held that, even where a customary marriage has not been proved the court may nevertheless presume the existence of a marriage where the facts lead to such a presumption. The decisions referred to were **Mary Njoki V John Kinyanjui Muthuru & 4 Others [1982 – 1988] IKLR 711**, **Shem Navade Asuluda –v- Peter Irungu Kamakia NBI HCC NO. 468 of 2008** and **Esther Wanjiku Njau & Lucy Njoki Njau –v- Mary Wahito NBI HCCC No. 303 of 2005**. The court made no reference to these decisions, and no reason was given for this. These decisions were binding on the court and ought to have been considered as they were relevant to the facts of the case.

12. In **Veronicah Rwamba Mbogoh – v- Margaret Rachel Muthoni & Another, Civil Appeal No. 311 of 2002**, the Court of Appeal restated the well-settled common law principle that the relationship between a man and woman, even if not ceremoniously marked as a marriage, may in essence be a marriage, and in a proper case, will on a *prima facie* be recognised as such. The Court of Appeal extended the application of the concept of marriage by cohabitation and repute from the monogamous setting associated with the common law to other forms of marriage, be they monogamous or polygamous. The court held as follows:-

**“For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The Court must go further and consider whether, on the facts and circumstances .....on record, the principle or presumption of marriage was applicable in the appellant's favour.”**

13. In **Hortensiah Wanjiku Yaweh –v- Public Trustee, Civil Appeal No. 13 of 1976, Mustafa, J.A.** stated as follows:-

**“(i) Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence can rebut such a presumption, see Re Taplin – Watson –V- Tate [1973]3ALL ER 105.....**

**(ii) I can find nothing in the ‘Restatement of African Law’ to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage**

**arising from long cohabitation. In my view all marriages – whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the applicant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated.”**

14. Counsel for the respondents submitted that since the appellant had not pleaded the doctrine of the presumption of the marriage as a basis for saying that the deceased was his wife, he was stopped from raising it on appeal. The case of **Independent Electoral and Boundaries Commission & Another – v- Stephen Mutinda Mule & Others Civil Appeal No. 219 of 2013** was referred to. However, throughout the trial it was clear that the appellant was relying, among other things, on their long cohabitation, the fact of the child and the reputation that the relationship had acquired, to say that the deceased was his wife. The trial court acknowledged this long cohabitation. One cannot honestly say that the issue is being raised on appeal for the first time.
15. Back to the facts of this case. I find that there was long cohabitation between the appellant and the deceased in which there was a child and the people they dealt with considered them as husband and wife. These facts gave rise to a presumption of marriage in favour of the appellant. I find that, on this basis, the appellant and the deceased were married. It follows that the lower court fell into error when it found that there was no valid marriage. I further find that the appellant was the one entitled to bury the remains of the deceased who was his wife.
16. That being the case, I allow the appeal with costs and set aside the judgment and decree of the lower court. In its place, there will be an order dismissing the respondents’ case in the lower court with costs.

**DATED and SIGNED at NAIROBI this 22<sup>ND</sup> day of JUNE 2016.**

**A.O. MUCHELULE**

**JUDGE**

**DELIVERED AND SIGNED this 24<sup>TH</sup> day of JUNE 2016.**

**W. MUSYOKA**

**JUDGE**