



IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 70 OF 2012

J M M M APPELLANT

-V E R S U S-

EGMRESPONDENT

(Being an appeal from the Judgment of the Hon. Mr. Ekhubi (RM) at Mombasa in Civil Suit NO. 422 of 2012 (Resident Magistrate's Court) delivered on 16th April, 2012)

JUDGMENT

1. **J M M M**, Appellant was dissatisfied with the lower Court's judgment and filed this appeal. The disputes before the lower Court related to the claim by the appellant and **EGM**, the Respondent, over their right to bury the late **FWM**, the Deceased. The Deceased died while delivering a child fathered by the Respondent.
2. The trial Court by its judgment of 16th April 2012 ordered the Deceased's body be released to the Respondent for burial.
3. This is the first Appellant Court and as such I am obligated to re-evaluate the evidence tendered before the trial Court and so doing I am required to come to my own independent conclusion but bearing in mind that I had no opportunity to see or hear the witnesses testify – see **SELLE –Vs- ASSOCIATED MOTOR BOAT COMPANY LTD (1968)EA 123.**

APPELLANT'S CASE

4. Appellant was the father of the Deceased. The evidence however show that Appellant and Deceased's mother were estranged and Deceased's mother left the matrimonial home with all the children. It does seem that the children of that marriage largely grew in the absence of the Appellant, their father. To prove that Appellant played very little role in the children's upbringing when he was asked in evidence in chief he was unable to say the age of the Deceased. The mother of the Deceased died on or about the year 2006.
5. Appellant stated that Respondent was unknown to him and that he first met him at Coast Provincial General Hospital where the Deceased passed on and where Respondent wanted to collect Deceased's body for burial.
6. Appellant stated that Respondent had not followed the Mijikenda Custom of marriage, if indeed he

had married the Deceased, which involved introduction of the groom to the bride's parents in the presence of witnesses who ought to have included uncles, aunts and neighbours. On that basis Appellant and his witnesses stated that Respondent had no right to bury Deceased.

RESPONDENT'S CASE

7. Respondent stated that Deceased was his wife and that they started cohabiting as husband and wife in the year 2009. That Deceased died after developing complications while delivering their child which child was taken to Respondent's mother.
8. That the Deceased had told him (Respondent) that she was an orphan but had introduced him to her sister called E and her grandmother. That it was that grandmother who gave him permission to live with Deceased.
9. The sister of the Deceased **EMM** stated that Respondent was her brother-in-law by virtue of being the husband of her Deceased sister.

ANALYSIS

10. Appellant has presented some 10 grounds of appeal which in my

view all call upon the Court to determine one single issue – **“Who is entitled to bury the Deceased's body?”**

11. Respondent lays his claim to bury the Deceased on the ground that Deceased was his wife by virtue of cohabitation. Although Appellant raised in his grounds of appeal that Respondent had not pleaded in the lower Court that marriage that is incorrect. Respondent by paragraph 13 of his Defence and Counter-Claim stated thus-

“The Defendant (Respondent) avers that he and Deceased FW M was (sic) married and that marriage was blessed with one issue.”

12. It is very clear that Appellant played very little role, if at all, in the upbringing of Deceased. Deceased was taken away by her mother together with her other siblings, when Appellant's marriage to their mother broke down. Deceased was then 3 years old. No wonder then Deceased told Respondent that she was an orphan, her mother having died in the year 2006. In those circumstances, and having played no role in upbringing of Deceased Appellant did not adduce evidence how under the Mijikenda Custom, he could have been approached by the Respondent for his daughter's hand in marriage.

13. Indeed the evidence that came out during the trial is that Deceased's educational needs were met by her uncles and lastly by her sister E. E stated in evidence that Appellant did not support Deceased in any way. In a much more telling statement E said that she was the guardian of Deceased. It is therefore not surprising that it was E who was informed by Deceased and the Respondent that they were cohabiting as husband and wife.

14. I fully support the finding of the Learned Trial Magistrate that there

was a presumption of marriage between Respondent and Deceased. I am indebted to the authority supplied by Respondent, even though he was acting in person, which is pertinent to this case being **CIVIL APPEAL NO. 313 OF 2001 PHYLLIS NJOKI KARANJA AND ANOTHER –Vs- ROSEMARY MUENI KARANJA AND ANOTHER.** In this case Court of Appeal stated-

“The presumption is nothing more than an assumption that the parties must be married irrespective of the nature of the marriage actually contracted. Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general

repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed: see **GACHEGE –Vs- WANJUGU [1991]KLR 147.**”

15. It is clear from that case that once the Court makes a finding of presumed marriage it need not investigate whether the customary norms of marriage were fulfilled. Respondent cohabited with Deceased from 2009 to 2012. They were blessed with a baby girl following that cohabitation.

16. The Court of Appeal had a long discussion on presumption of

marriage in the case **JOSEIS WANJIRU –Vs- KABUI NDEGWA KABUI & ANOTHER [2014]eKLR** as follows-

“There is a long line of authorities in which Kenyan Courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on Section 119 of the Evidence Act, Cap 80 Laws of Kenya, which provides as follows-

“119. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife

The former Court of Appeal for East Africa, in the case of **HORTENSIAH WANJIKU YAWE –Vs- THE PUBLIC TRUSTEE, CIVIL APPEAL NO. 13 OF 1976**, among other things, held that long cohabitation as a man and wife may give rise to a presumption of marriage in favour of the party asserting it. At page 21 Kneller J.A., stated-

“The presumption does not depend on the law or system of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife ...”

17. Having upheld the trial Court’s finding that there was a presumed

marriage the decision in the case **RUTHER WANJIRU NJOROGE –Vs- JEMIMAH NJERI NJOROGE & ANOTHER (2004)eKLR** will assist to determine the single issue I identified above. The Court in that case stated-

“As I have already stated earlier on, the person, in social context prevailing in this country, who is in the first line of duty in relation to the burial of any deceased person, is the one who is closest 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 that 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.”

18.The responsibility of burying the Deceased falls on the person who has the closest relationship connection. In this case it falls upon the Respondent to whom the trial Court rightly released the body of the Deceased for burial.

19.This case in my mind brings to light the fact that the Kenyan Society

is caught betwixt the application of tribal/community customs and the Western outlook. We cannot deny it that as society that there are those, amongst us, unless customary norms are followed, and especially in marriages, there is no marriage. Yet there are those amongst us to whom there is a marriage, so long as those contracting it consent. What then becomes to those who do not follow the customs of a tribe or community. Are they to be forced to adhere to those customs despite their changed outlook?

20.The Respondent and the Deceased consented to live together as husband and wife. Would a community such as Mijikenda be allowed to say that they are not husband and wife. In my humble view, they ought not to be allowed to impose their strict adherence to customs on the Respondent and Deceased.

21.In the end I uphold the judgment of the Learned Trial Magistrate. I order the body of **FWM** be released to **EGM**. Respondent shall pay the costs of this appeal.

DATED and DELIVERED at MOMBASA this 20TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE