REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NUMBER 212 OF 2007

BBK. …….....…… APPELLANT

VERSUS

SMNK. …… RESPONDENT

(From the judgment and orderof L. K. Mutai, Senior Resident Magistrate in Githunguri SRMCC no. 103 of 2002)

J U D G M E N T

Appellant, by a plaint dated 27th September, 2002, sought judgment against the defendant for a sum of Ksh.288,300/- being dowry (Ruracio) arising from Defendant's customary marriage to the Plaintiff's niece known as L NN, (then deceased). The appellant averred that he had adopted the said niece as her daughter and when she got married, he was entitled to dowry. He enumerated the items that formed the dowry and their values, which added up to the sum claimed.

In his defence, the Respondent/Defendant admitted he was indeed married to the said LNN. He however, denied that the said N was an adopted daughter of the plaintiff or that the Plaintiff was at any time entitled to receiving dowry from the Respondent under Customary law or any other law.

In his testimony before the lower court the Appellant supported his pleadings. He, however, admitted that he did not adopt the said N in 1962 as pleaded but in 1975. He also testified that N was originally taken to his home as a house maid but later he decided to give her education which enabled her to obtain a job. He also said that N's mother lived several years after Ngot married to the Respondent but that the Appellant nor Ns mother did not seek to be paid the dowry during N's mother's life.

Appellant admitted too, that N's mother did no sign any adoption document in relation to N but that the way he looked after and educated, N was tantamount to an adoption process according to custom.

In his judgment, the learned trial magistrate concluded that the Appellant/Plaintiff failed to prove his claim on the balance of probability. He decided that there was no evidence of an agreement for adoption between the parents of N and the Appellant and that what he did to help her, was voluntary and out of generosity and did not amount to adoption.

As to demand of dowry arising from the marriage of Nand the Respondent, the learned magistrate noted that if dowry was due, it should have been due while N's mother lived since she would have been the one more entitled to it. He noted also that N died in 1999 by which time the issue of dowry had never been raised by the Appellant. This raised the conclusion that the claim was a second thought. Finally, the

magistrate concluded that in customary law, dowry is returned to the living husband when the wife dies. That the opposite, where dowry is sought after the wife has died, is unheard of. He dismissed the claim, which triggered this appeal by the Plaintiff/Appellant.

I have carefully perused the record and independently considered the evidence. Clearly, the Respondent/Defendant did not controvert the evidence of the Plaintiff/Appellant. So the issue is whether the evidence as it stood, proved the claim on the balance of probability. The Appellant had admitted that he had no specific agreement for the adoption of his niece N. He simply stopped treating her as a housemaid and assisted her to go to school as well as provided her material needs. Furthermore, there is evidence that N's mother was, alive until after N got married but there was no evidence that she sought dowry from the Respondent, although N's mother was, without question, the one entitled.

Also, the Appellant himself did not appear to have demanded dowry during the lifetime of Ns mother. He only did so not only after N's mother had died but also after N herself had died. This strengthened the view which the learned trial Magistrate adopted, that Appellant had no intention of seeking dowry when N and N's mother were alive. I do agree with the conclusions reached by the trial magistrate. I find also that Appellant failed to prove sufficiently, that Nwas her adopted daughter or that the thought of recovery was not a second thought which occurred only after the mother of Nand N herself, had died. Accordingly he really had no cause of action to take to court.

In the circumstances, I find no ground for interfering with the decision of the trial magistrate who in any case, was better placed to judge matters of fact which were ventilated before him.

The appeal as a result, is dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 7th day of March 2012.

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D A ONYANCHA
JUDGE