



REPUBLIC OF KENYA

High Court at Meru

Civil Appeal 52 of 2002

DAVID KIRAITHE MAGAMBO .....  
.....APPELLANT

VERSUS

DOROTHY CIAKAURA DAVID .....  
RESPONDENT

JUDGMENT

The appellant was the defendant at the lower court. The respondent had sued the appellant for a declaration that the appellant had no capacity to contract a statute marriage with Miss Felicity Keeru Mburia and an order for maintenance of status quo in respect of the marriage between the appellant and Miss Felicity Keeru Mburia until the respondent suit is disposed, costs of the suit, interest and any other or further relief this court may deem fit to grant.

The trial court after hearing the suit entered judgment in favour of the respondent and declared that the defendant David Kiraithe Magambo had no capacity to contract a statute marriage with Miss Felicity Keeru Mburia and awarded costs of the suit to the respondent.

The appellant being dissatisfied with the trial court's judgment preferred this appeal setting out 8 grounds of appeal as follows:-

- 1. The learned Resident Magistrate erred in law in holding that the respondent had proved her case on a margin of probabilities.***
- 2. The learned Resident Magistrate erred in law in failing to consider at all or disregarding the appellant's documentary evidence produced in court.***
- 3. The learned Magistrate erred in law and fact by holding that there were issued of marriage in absence of any documentary evidence.***
- 4. The learned Resident Magistrate erred in law and fact in holding that the respondent had adduced evidence and proved her case on margin of probabilities whereas he had not adduced enough evidence to prove the same.***
- 5. The learned magistrate erred in law when he completely ignored the evidence of the appellant and the submission by his counsel.***

**6. The learned trial Magistrate erred in law and fact when he held that there was customary married between appellant and respondent when there was evidence to the contrary.**

**7. The learned Magistrate erred in law when he declared the appellant had no capacity to marry FELICITY KEERU MBURIA under statutory marriage under Kimeru customary law.**

**8. The learned magistrate erred in awarding the respondent cost of the suit.**

When the appeal came for hearing the respondents though served she did not attend. The appellant on his part requested court to consider his grounds of appeal, allow the appeal and set aside the lower court judgment.

This court has considered the grounds of appeal. The proceedings and judgment of the trial court and the relevant law in determining the appeal.

The facts of the respondent's case are that the appellant and the respondent are husband and wife having contracted a marriage under Meru Customary law and which marriage still subsists. That the marriage was blessed with 4 children. That during the substance of the said marriage the appellant Unlawfully and illegally engaged and/or contracted for a marriage with on Miss Felicity Keeru Mburia and the arrangements for proposed unlawful marriage under African Christian Marriage and Divorce Act (Cap.25) laws of Kenya are at an advanced stage.

That the announcement of wedding banns had been made twice on 17<sup>th</sup> August, 1997 and 24<sup>th</sup> August, 1997 and a final announcement was meant for 31<sup>st</sup> August, 1997. The respondent averred that the appellant had no capacity to contract a statue marriage.

The appellant on the other hand denied having ever contracted any marriage with the respondent on 27<sup>th</sup> May, 1974 or on any other day or at all. The appellant herein admitted there is only one issue of marriage namely Emily Kagendo Kiraithe and averred the said issue was born out of the wedlock and denied knowledge of any other child between the appellant and the respondent. The appellant contended that since the appellant was not married under any system of the law nothing precluded him from contracting a marriage under the African Christian Marriage and Divorce Act (Cap. 151) Laws of Kenya.

The appellants grounds of appeal are interrelated and deal with the evaluation of evidence and I intended to deal with all grounds of appeal altogether.

The respondent testified as PW1 at the trial court. She testified that she married the appellant in 1974 under Meru customs and rites and that they have 4 children. That in 1997 the appellant wanted to marry Felicity Keeru and printed cards for wedding invitations. That respondent filed suit and obtained an injunction order. The appellant was called to arbitration meeting by elders but declined to attend. That the appellant paid dowry in accordance with customary law being 1 goat, 2 blankets, a hat, a lessa and shirt and Kshs 1,000/- the dowry was paid by the appellant's father. The respondent testified that their customary marriage has not been dissolved according to Chuka Customary Laws. PW2 father to the appellant confirmed that the appellant and the respondent are husband and wife and that they stay together. He testified that he paid 3 goats to the respondent's father and a blanket, a coat, and a cap as dowry. That PW2 was in company of many people when he went to pay the dowry.

PW2 confirmed the appellant had another wife. He confirmed the issues were born during the substance of the marriage between the appellant and the respondent. He confirmed the customary marriage has not been dissolved. PW3 brother to the respondent confirmed the appellant and respondent married in 1975. That the appellant visited the PW3's home seeking the respondent's hand in marriage. That they brought 3 goats, 2 blankets, a sheet, a lessa, a cap and shirt as dowry. That the respondent and the appellant stated staying together and are still staying together as man and wife. That they have not divorced and have 4 children.

The appellant testified that he got a child with the respondent in 1975 when he was working at

respondent's home. The child is called Emily Kagendo and in the same year he got a child with appellant's sister on Pauline Ciankare. That in protest the two sisters were taken to appellant in 1984. That the respondent started frequenting appellant's home and that she never went home as a wife even for a day. That in 1997 when the appellant wanted to have a wedding the respondent started complaining. The family failed to arbitrate hence this suit. In cross-examination the appellant averred that he contributed towards payment of dowry for his two daughters. DW2 testified the appellant and the respondent had one child called Emily Kagendo. DW2 testified the appellant's and the respondent's families met in 1994 and 1999 and they agreed on dowry for the two daughters at a rate of 10 goat each.

In the restatement of African Law, Kenya Vol. 1 Chapter 4 by E. Cotran for a valid customary law marriage involving the Meru and Tharaka consent of spouses and families of spouses are necessary.

Under 2(a), (b) (i) (ii) it is provided:-

***“Spouses. The prior consent of both spouses essential to the validity of marriage.***

***(b) families of spouses:***

***(i). the family to the husband. The consent of the husband's family was essential to the validity of a first marriage. The family is represented by the husband's father.***

***Modern development. The consent was essential in the past since the husband's family provided, or helped in providing the ruracio. Nowadays, however, if the husband has independent means, and can pay the ruracio without the assistance of his family, he may marry without their consent.***

***(ii) The family of the wife. The consent of the family of the bride is essential to the validity of the union. The family is represented by the family is represented by the bride's father.”***

Further marriage consideration or dowry is paid on behalf of the bridegroom to the father or a guardian of the bride. Cotran in his book on page 38 under 111 Marriage consideration stated as follows:-

***“1. Definition of marriage consideration (ruracio)***

***Ruracio is a payment or payment of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father or other guardian of the bride, or the agreement to pay, which is necessary to the validity of the marriage and to establish the affiliation or legal control of the issue of the union, and which may be repayable in whole or in part of the dissolution of the marriage. Ruracio must be distinguished from collateral payment and other gifts made at the time of the marriage (for which see p.39) which are not returnable on the dissolution of the marriage.***

***2. Character of marriage consideration.***

Ruracio consists of cattle, sheep, goats and honey or other equivalents in money.

***3. Amount of marriage consideration.***

***The amount of marriage consideration in the various divisions of Meru is standard, and is as follows:-***

***South and North Imenti:- One ewe, one heifer, two bulls, and one tin of honey***

***Nithi Division: One heifer, one bull, fifteen goats and one tin of honey***

***Nyambene Division: one heifer, one bull, seven goats, one tin of honey***

***Tharaka: four heifers, one bull, forty Eight goats***

***Explanation: although the amounts of marriage consideration have been standardized, the amounts paid may be varied by agreement between the parties. The effect, therefore, is that a person may not use in court for any amount in excess of the standard.”***

In the instant appeal the appellant admit that dowry was paid but avers it was for the two daughters. The appellant did not call any evidence to show that under Meru Customary Law dowry is payable in respect of sired children to parents of the daughters. He did not rebut the evidence of PW1, PW2 and PW3 that dowry was paid in respect of his marriage with the respondent.

I find that there is sufficient evidence both appellant’s family and that of the respondent met over the appellant’s marriage to the respondent. That dowry was paid and that the parties have and still man and wife. The fact that they may not be staying together or meet once in a time is immaterial as regards their marriage. I therefore find that the trial court correctly found that the appellant was married to the respondent under Customary Law and that their marriage was subsisting. I further find that the trial court having correctly found that there was a valid marriage between the appellant and the respondent under customary law it correctly found the appellant lacked capacity to contract a marriage under the African Christian Marriage and Divorce Act which marriage is monogamous in nature.

The upshot is that the appeal is without merits and is dismissed. That as the respondent did not contest the appeal and the parties are still husband and wife I shall order that each party bear its own costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 13<sup>TH</sup> DAY OF DECEMBER, 2012.

**J.A. MAKAU  
JUDGE**

**Delivered in open court in presence of:**

Appellant – present

Respondent – absent

**J.A MAKAU  
JUDGE**