



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 77 OF 2010

NDERITU NDIRANGU.....APPELLANT

VERSUS

PATRICK MWAGO WANJAU.....RESPONDENT

J U D G M E N T

The Appellant herein one Nderitu Ndirangu was the plaintiff in **Kerugoya Civil Case No. 158 of 2010**. He is the father of the late Ann Thanji who is the subject of this suit. The Respondent was the defendant in the suit before the subordinate court and the plaintiff in the counterclaim. The body of the late Ann Thanji is still lying in the mortuary awaiting the conclusion of this appeal. It is important to retrace the matter to the subordinate court in order to bring up the gist of the evidence adduced there and to analyze the same with a view to determining whether the judgment rendered by that court is sustainable or not. A summary of the claim and evidence adduced before the subordinate court is to the effect that the deceased who was a daughter to the Appellant was brutally murdered in her house at Kerugoya town on the night of 13/5/2010. She and the defendant had been living as “husband and wife” for about 19 years prior to that unfortunate incident. The defendant then embarked on funeral arrangements but the same hit a snag when the plaintiff claimed the right to bury his daughter saying that he did not recognize the “marriage” between the defendant and the deceased. He therefore moved the court seeking injunctive orders to stop the defendant from burying the deceased.

Concurrently with the plaint, he filed an application for injunction under certificate of urgency. It is in the Affidavit in support of that Application that he claimed in paragraph 7 thereof that the defendant was the deceased’s boyfriend and that no marriage ceremony had ever been celebrated between the 2 and he therefore had no right to bury the deceased.

A defence and counterclaim were filed in which the defendant/respondent averred that there was a valid Kikuyu customary law marriage between the 2. He maintained that he was the deceased’s lawful husband and he therefore had a right to bury her.

The judgment is nonetheless oblique and not very clear on whether the said ‘marriage’ was under Kikuyu customary law or an inference of a presumption of marriage from the long cohabitation and intention of the parties. The learned trial magistrate made the following finding:-

“My finding is therefore that the deceased and the defendant intended to marry freely and willingly. It would not be right to expect too formal a situation of an ostensible marriage. Its apparent there was an intention to pay dowry later and some transaction took place illustrating the parties had put that

intention into practice hence a presumption of marriage...”

It is against this judgment that the Appellant has filed the Appeal. He has proffered 7 grounds of Appeal as hereunder.

- 1. That the learned trial magistrate erred in law and in fact in finding that the Respondent had proved his case to the standards required by law.***
- 2. That the learned trial magistrate erred in law and in fact in declaring the respondent as the rightful person to burry the remains of the late Anne Thanji in his capacity as her lawful husband.***
- 3. That the trial magistrate erred in law and in fact in finding that the deceased Ann Thanji and the Respondent were married under the Kikuyu customary law.***
- 4. That the judgment of the trial court was against the weight of the evidence of the applicable law.***
- 5. That the learned trial magistrate erred in law and fact in finding that the Kshs.5,000 paid by the Respondent’s family formed basis for a Kikuyu customary law.***
- 6. That the learned trial Magistrate erred in law and in failing to consider the evidence adduced by the appellant and his witnesses and the submissions submitted on behalf of the Appellant.***

This brings me to the same question the learned trial magistrate posed and attempted to answer.

“What constitutes a valid Kikuyu customary marriage?”

Both counsel have extensively submitted on this issue. The essentials of a valid Kikuyu customary marriage are well defined and settled. These are as summarized in Eugene Contran’s case book on Kenya customary law:-

- (a) capacity to marry***
- (b) consent (as between the parties and their families)***
- (c) Ngurario***
- (d) Ruracio***
- (e) Commencement of cohabitation***

The *Ngurario* ceremony is what seals a marriage and there can be no valid marriage under Kikuyu customary law without the *Ngurario* (slaughtering of a ram). Indeed as admitted by both parties herein, the “*ruracio*” or dowry is a continuous process and can be paid throughout the marriage – in some instances even after one party to the marriage has died.

In the present case, both parties are in agreement that no *ngurario* was done and no dowry was ever paid. The only traditional ceremony that the defendant claims to have performed is the payment of “*mwati* and *harika*” i.e. taking of the Ewe and Ram which is the starting point to signify the acceptance of the ‘boy’ into the girl’s family. Negotiations for dowry and *ngurario* process follows thereafter.

According to the plaintiff herein however, the defendants family took only 5,000 Ksh. As a gift to the family of the deceased and to report that they had ‘stolen’ the plaintiff’s daughter. He denied that the same were for *mwati* and *harika*. In my view and understanding of Kikuyu customs, the parties do not go carrying the ‘*mwati*’ and ‘*harika*’ on the very first day they visit their in-laws. How would they do so yet they do not even know if the in-laws would consent to the relationship? The 5,000Ksh. could not in my view been for *mwati* and *Harika*. It could have been the fine for (*uici*) for taking the plaintiff’s daughter

initially without his consent.

Even if we were to assume that it was, (for the sake of argument) that would not in the absence of any of the other customary rituals constitute a valid Kikuyu customary marriage. Both sides agree that no dowry negotiations ever took place; none was ever paid, there was no *ngurario* or cutting of the shoulder. There was just the first meeting of the families – and the consent followed by the long cohabitation. I totally agree with Nyamu JA in his sentiments in the case of **MARY WANJIRU GITHATU VS ESTHER WANJIRU KIARIE (Court of Appeal at Eldoret in Civil Appeal No. 20 of 2009)** where in his dissenting judgment he stated:-

“It is important to observe that customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage. A customary law marriage is a covenant of marriage sealed by the necessary customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the ‘come we stay’ marriages which are neither customary nor statutory”.

Other than for the long cohabitation, none of the other essentials of a Kikuyu customary marriage have been established let alone proved. This relationship does not meet the threshold of a Kikuyu customary law marriage.

What we are left with now is a relationship categorized by long cohabitation of about 17 years with 2 issues of the marriage who are named in accordance to Kikuyu customary law. Can the court then infer or presume a marriage from these circumstances? In the *locus classica* case of **HOTENSIA WANJIKU YAWE VS PUBLIC TRUSTEE (Civil Appeal No. 13 of 1976)** Mustafa JA stated

“I can find nothing in the Restatement of African law to suggest that the Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view all marriages in whatever form they take, civil or customary or religious are basically similar, with the usual attribute and incidents attaching to them.”

Wambuzi P. (JA) in the same case stated that the presumption is nothing more than an assumption that the parties must be married ***irrespective of the nature of the marriage actually contracted.***

Although my finding is that unlike in the Yawe case (*Supra*) there was actually no kikuyu customary law in this matter, the above statement by Wambuzi JA would include **“any marriage however contracted”**. This would include a relationship like the one between the defendant and the deceased.

The express intention by the defendant and the deceased herein to marry coupled with the long cohabitation and the naming of children under kikuyu customary law amounts to more than a “come we stay” relationship. A presumption of marriage can aptly be made in these circumstances. It would be a travesty of justice for the court to fail to make a presumption of marriage from the circumstances herein and thus render the children of the deceased illegitimate while they have lived with and known all along that the Defendant/Respondent was their father. This would be subjecting them to degrading and discriminatory treatment. It would be against their best interests which the courts by law are commanded to prioritiz, respect and enforce.

In conclusion, I would like to state that there are no winners or losers in this Appeal. I say so because, I have found as a fact that there was no kikuyu customary law marriage in existence as put forward by the Respondent. In that respect therefore, I have upheld some grounds of the Appeal. On the other hand, I have made a finding of presumption of a marriage – in favour of the Respondent. Although I must dismiss this Appeal, it is not because the Appellant has lost it in its totality. I therefore dismiss it with orders that each party bears its own costs. I uphold the judgment of the learned trial magistrate but order that the Respondent bears the full costs of the funeral which will include the mortuary fees. This is regardless of the fact that the Appellant had offered to settle the said fees.

I so order.

**W. KARANJA
JUDGE**

Signed by the above but delivered and dated by the undersigned at Embu this 29th day of March, 2011.

**M. WARSAME
JUDGE**

In presence of:- Ms. Muthoni for the Appellant and N/A for the Respondent.