



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 536 OF 2010

MUTEMI MULI MUNYAMBU..... PLAINTIFF

V E R S U S

ANN MWIKALI..... DEFENDANT

JUDGEMENT

Coram: Hon. Mwera J
Musyoki for the Plaintiff
Mrs. Mambili for Defendant

Jane Court Clerk

The plaintiff ***Mutemi Muli Munyambu*** filed this suit by way of plaint on 12.11.10 against Annah Mwikali. Therein he pleaded that the two were husband and wife w.e.f. 1979 and they were blessed with 5 children

1. **Mwinzi Mutemi**
2. Mwanthi Mutemi
3. Paulina Mutemi
4. Kanyaa Mutemi and
5. Mumo Mutemi

On 25.8.10 this first child **Mwinzi Mutemi** died (the deceased) in a traffic accident at Karatina. On the same day and without consulting the plaintiff, the defendant moved the deceased's body from Karatina to Chiromo Mortuary, Nairobi.

As the plaintiff's family was making arrangements to bury the deceased at his home in Mui Location Mwingi the defendant was preparing a grave in the compound of a stranger where she had ran to cohabit, with the intension of burying Mwinzi Mutemi there.

To do so she obtained a burial permit, took custody of the deceased's documents, thus making it impossible for the plaintiff to go ahead and bury Mwinzi. The plaintiff averred that as the father of the deceased he was entitled under Kamba customary law to bury his son in his home. He could not be buried in the land of strangers at all. Accordingly, the plaintiff had sought a permanent injunction to bar the defendant from taking the deceased's body for burial in a place other than the plaintiff's home at Mui. The deceased's body ought to be released to him for burial. Reference was made to a previous suit in the lower court.

On 29.11.10 the defendant filed a defence and a counter – claim. She denied the claim that she ever married the plaintiff or that they had children including the deceased. The plaintiff was not the father of the deceased and during trial she could apply to have a DNA test carried out on both. The claim in the plaint to the observance of Kamba customary law was termed tenuous. Such law if it existed was immoral and repugnant to justice. And that the lower court case was dismissed for want of jurisdiction.

In the counter-claim it was pleaded that the defendant cohabited with the plaintiff between 1979 and 1990 when she left for another man with whom she continued to live with the five (5) children named in the plaint, for some 20 years. The deceased was married with 3 children, and living in the house he built at the defendant's home. That is where he should be buried. The deceased was adopted by that other man whom the defendant married and so he became the deceased's adopted father under Kamba customs. The deceased's body should therefore be released to her for burial where the defendant is now married.

The plaintiff whose full name was given as Francis Mutemi Muli Munyambu (PW1) of Mwingi told the court that the defendant was his wife between 1979 and 1994. They had six(not 5) children during that time (add, Wambua Mutemi). **Mwinzi** the deceased was born in 1982 and he died in August 2010 in a road accident. The plaintiff visited the deceased's former employer where he learned that Mwinzi's body had been moved to Chiromo Mortuary Nairobi. After viewing the body, the plaintiff started to make burial arrangements. He involved the defendant as Mwinzi's mother, even as she exhibited no desire to be involved initially. Then later she told the plaintiff that she wanted to bury Mwinzi. She had all the necessary documents including body movement permit. The plaintiff could thus not remove Mwinzi from the mortuary. From the defendant's bundle of documents PW1 noted that a burial permit had been issued to Jackline Kamene. The plaintiff did not know this Kamene, who had described herself as the wife of Mwinzi. To PW1, Mwinzi was never married. As the father, he did not make such arrangements. Mwinzi did not disclose to PW1 whenever he visited home that he was married. Mwinzi's home was in PW1's homestead. When domestic problems arose between the plaintiff and the defendant, the latter left the former's home with the youngest child (Wambua) to a place the plaintiff did not know. He remained with the rest of the children who after school left home to go in search of employment. The plaintiff and the defendant contracted a Kamba customary marriage, with all the attendant rites in which his uncle Mutua Munyambu represented him. There was never a divorce and the defendant did not come into the marriage with Mwinzi as her child. The defendant had left the children with the plaintiff. Had she gone with them to her new husband, that husband could be obliged to repay his dowry – 4 head of cattle plus goats.

The plaintiff did not know somebody called Sammy Syano Nzuki, said later to be deceased's father-in-law. He did not know whom the defendant went to marry when she left the plaintiff's home – a place where the defendant wanted to bury Mwinzi.

The court heard that Mwinzi Muli was the name of the defendant's father. By custom Mwinzi the deceased must be buried in the plaintiff's compound. He had no homestead of his own.

When it came to cross examination, the court heard that when the plaintiff married the defendant he did not know if she was pregnant. According to Kamba customs the plaintiff's first born son should have been named after his father. But he named his son (the deceased) after his grandfather. The plaintiff paid dowry after 5 years. When the defendant left the rest of the children with the plaintiff, they started leaving home after std. 8 at about 12 years of age. While the boys went to town, the girls got married. Mwinzi, the deceased, was 18 years when he left home for town – not to follow his mother. The plaintiff proceeded to explain where other children went to but he could not remember where Wambua was. The couple separated in 1994 after reconciliation efforts failed. Whenever the plaintiff went visiting Mwinzi, he found him with various girls. He did not know one Jackline Kamene. He did not know the deceased's 3 children or the one said to have died. The deceased had no other home. He had begun to build in his father's compound by the time he died. Neither the defendant nor Jackline, who took the burial permit, should bury Mwinzi. And the plaintiff did not want to bury him in order to benefit from his estate.

Mwinzi Muli (PW2) of Mutito, Kitui aged 80 years took the witness stand. He told the court that

the plaintiff was his son-in-law having married Annah Kalunda Mwikali (the defendant), his daughter. PW1 paid 4 head of cattle and 6 goats. One goat was slaughtered as per Kamba custom. The elders who had been present including his own brother were since dead. When the defendant married the plaintiff, she had no child. Then they got children including Mwinzi Mutemi, the deceased. The plaintiff and Annah never divorced. She was Mwinzi's mother while Mutemi, the plaintiff, was his father. There are no divorces in Kamba customs. When one that could be occurs, the husband returns the wife to her parents and demands return of his dowry. A woman leaving her husband goes back to stay with her parents. Neither had Mutemi demanded his dowry back nor had Annah returned to him from their marriage. A son who has not left his father's compound, on death he is buried there even if he is married. Annah did not marry Mutemi while she was having Mwinzi. If it had been so, Mwinzi could still have belonged to Mutemi. PW2 had no disagreements with the defendant and no man had visited PW2's home claiming that he had married Annah.

During cross examination PW2 told the court that he himself married from the family of someone the plaintiff referred to as Mutinda. (Note: As the story progressed, it transpired that the defendant's present husband had that name.) At no time did this Mutinda go to PW2's home to betroth Annah. He just took Annah and they cohabited. No dowry paid. Mwinzi who died aged about 20 years, had no home of his own. He was still in Mutemi's home. PW2 did not know that the deceased was married or had children. When dowry was paid for Annah (the defendant) she was in the husband's home. The deceased lived in Nairobi working for a transport company. To PW2, the deceased was born in 1992. When Mutemi paid dowry Annah was not present. It was not necessary.

Mutua Munyambu (PW3) of Elondi Village did not know when he was born. PW2 (Mwinzi Muli) was his age mate. PW3 knew PW1 – a nephew. When the plaintiff married PW2's daughter (the defendant), Muli Munyambu, the plaintiff's father, asked PW3 to accompany him to the bride's home. The plaintiff, PW3's nephew, was marrying Annah Muli (pointed at). 4 cows plus 6 goats were paid as per custom. The marriage was thus celebrated. In case there was a divorce the dowry could be returned to the husband. That did not happen in the subject marriage. Mwinzi Mutemi (deceased) was culturally PW3 grandfather. When they married Annah, she did not have a child. The deceased was born when Mutemi and Annah were cohabiting together. The deceased was Mutemi's son. When a woman marries with a child it belongs to its father. Mwinzi should be buried in Mutemi's (PW1's) compound even if his parents were separated. If he was married, the wife cannot claim to bury him. PW3 had no grudges with the defendant.

At the time PW3's clan took dowry to Annah's home no other dowry had been paid there.

PW3 could not say how many of the plaintiff's children had left home. But once when the deceased was on leave, he started making building bricks - some 3 years back. Otherwise he had a small grass thatch hut at home. He had no wife; no dowry was paid; he died in Nairobi. The witness said that the deceased's siblings also left home with the girls marrying. The plaintiff's case closed.

The defendant (DW1) told the court that she married the plaintiff in 1979. They separated/divorced 9 years later – 1996. She married with one child and the two had 3 more children. When the defendant left the plaintiff she returned to her parents and later moved to Nairobi. No dowry had been paid for her. At Nairobi the defendant married one Mutinda Musili who paid dowry in 1997. After 18 years of marriage Mutinda died in February 2009. They had 3 children. The children of the first marriage came to live with the second husband. The deceased, Mwinzi Mutemi, left the plaintiff while aged 6 years. He lived in the new home until he got to age 30. He was working with a transport company but was married with 3 children and living in his own compound. Mutinda took Mwinzi as his son. When he (Mwinzi) married in 2000, the defendant with Mutinda, as parents performed all the necessary rites. The defendant had 4 children with the plaintiff – Mwinzi Mutemi, Paulina, Nduki and Muasya. She left them with the plaintiff. Mutinda and Annah had in all 8 children including those she came with from the plaintiff's home. They all became Mutinda's children. The deceased lived in the defendants' compound where he had built a house. Annah did not know if the plaintiff paid dowry for her. She was not present. If a man does not pay dowry for his wife, they cohabit merely as friends, but if the 2nd husband pays it then there is a marriage. The defendant asserted that she did not want to bury the deceased. It was his wife who

wanted to.

In cross-examination, the court heard that when she married the plaintiff, she was pregnant. She gave birth in his home. For 9 years the plaintiff did not accept Mwinzi as his son. He was the defendant's child. The two had other children. When she married Mutinda in 1996 the deceased was the first to follow her there. At this point the defendant said:

“I married the second time in 1996

I married Mutinda in 1992

I left the plaintiff in 1986 – not 1996.”

And she could not recall when the deceased followed her in her second marriage. When Mutinda paid dowry in 1997 – 5 years after marriage, Mwinzi was thus (not) his son. Even with that he could be Mutinda's son by adoption Then:

“Mutinda paid dowry to my father.

**He told lies before this court to force me
to go back to the plaintiff.”**

Mutinda paid dowry in presence of relatives from both sides including one Mzee Musya who was still alive but was not going to testify. The deceased still carried the plaintiff's name, Mutemi, as he was known at school.

That the deceased took an ID Card at age 15 – not 18. Looking at the ID placed before court it stated that the deceased was born in 1982 and he took the ID in 2010. The defendant said that she did not know anything about this ID. References veered off to an affidavit and other material in CMCC 5412/10. But at this point the court was disinclined to use the material eg. the defendant's replying affidavit sworn on 8.10.10 because that suit was said to have been dismissed in the lower court for want of jurisdiction – not withdrawn/transferred to this court. The plaintiff did not deny/clarify the former grounds for the case not to go on in the lower court. Accordingly, that suit was a nullity with all that went with it. That includes anything that preceded 12.11.10 – when this suit was filed. Any documents that did not appear in connection with the present suit, were therefore not relevant.

The defendant denied knowing Mutinda Munyambu (PW3) and repeated that the deceased had his house in the compound of Mutinda at Kitise, Mwingi. The defendant left the plaintiff's home after 9 years from 1979 – year of their marriage.

Jackline Kamene Kyalo (DW2) of Pipeline Nairobi did not know the plaintiff. He was not her relative. The defendant is her mother-in-law by virtue of her marriage to Mwinzi Mutemi, the deceased. When she married the deceased in 2000 Mutinda was his father while Annah was the mother. After 11 years of marriage the couple had 3 children. One died and was buried at their compound at a place called Mathuke, Kitise. The couple had built a stone house there as their matrimonial home. After death DW2 procured Mwinzi's burial permit as the wife. She wanted to bury him at their home. The deceased had not told the witness of any other home.

In cross examination questions tended to refer to documents filed in the lower court before this suit. As noted above those papers are of no value here. DW2 said that dowry was paid when she married. She went over the names of the brothers and sisters of the deceased, with whom she lived in Nairobi. They bore the name of Mutinda not Mutemi. Then she referred to the deceased's brothers and sisters with the name of Mutemi – not Mutinda. DW2 did not know why. She never visited the home of one Mutemi but she visited the deceased's home and met his relatives. At no time did the deceased tell DW2 that his father was Mutemi Munyambu and not Mutinda Musili. She should bury the deceased as the wife according to Kamba customs.

James Mzee Musya (DW3) knows the plaintiff – they are clansmen. He described their relationship. Mutinda Musili was Annah's husband. The deceased, Mwinzi Mutemi, was his cousin because DW3 and Mutinda were relatives. The witness met the deceased on 18.8.10 at Mathare 4A. He had a wife with children and they had built in Mutinda Musili's compound. She should bury Mwinzi.

DW3 lived some 2 kms from Mutinda's home.

“I know Mwinzi Mutemi – deceased No. Mwinzi Mutinda.”

The witness only heard of the name Mwinzi Mutemi after he died otherwise the deceased is Mwinzi Mutinda. DW3 was present when Mwinzi paid dowry for Jackline in 2006. Annah married Mutinda in 1992. Dowry was paid to Mwinzi Muli (PW2).

At the time Annah had 8 children – 3 sons and 5 daughters, with Mwinzi (deceased) going to school. All the children initially remained where Annah was married and later followed her to her new husband's home. Annah was married before. In the event of a subsequent marriage, the 2nd husband was to refund the first dowry before his own was accepted.

Then as if in contradiction

“I do not know that Annah Mwikali has been previously married.”

Kithome Kula (DW4), a builder in Nairobi, comes from rural Mwingi. He knew the deceased as well as Annah – his brother Mutinda's wife. Mwinzi was his brother's son. Jackline was Mwinzi's wife, daughter of Sammy. Mutinda, Mwinzi's father, lives at Mathike. Jackline should bury Mwinzi.

There was no name Mutemi, in their Mutinda family. When Annah was married into the Mutindas, her father told them also to take her children. Then Mwinzi came first and others followed. The witness did not know where they were coming from. Except Mwinzi, the rest were small. The trial closed. Both sides submitted.

Mr Musyoki stated on behalf of the plaintiff that the plaintiff and the defendant were married and the deceased was their son plus other children. When the 2 separated, the children followed the defendant to her new home (Mutinda) as they grew of age. He deceased had established a home in his father's compound. The plaintiff and defendant did not formally divorce. After analyzing the pleadings and the evidence the court was urged to find that the plaintiff has the right and should bury the deceased, not the defendant, in his compound. It was added that the plaintiff's evidence had been plain and consistent while that from the defendant's side was unreliable and even contradictory. Governed by Kamba customary law and with no evidence that the deceased had established a home of his own elsewhere, he should be buried by his father (the plaintiff).

As for the defendant, the deceased ought to be buried in his homestead where his family resides. He was a grown-up person. She maintained that dowry was not paid to her father (PW2). She was not present. So there was no marriage validly celebrated. The two simply lived as friends and the defendant could separate/divorce without any customary formality. The plaintiff and the defendant were married from 1979 to 1990. The defendant with the wife should bury the deceased. Otherwise following Kamba customary law here regarding the burial, could be repugnant to justice and morality.

The single question this court has to answer here is: Who between the plaintiff and the defendant should bury the deceased Mwinzi Mutemi? These are the two with pleadings before court. It is not in dispute that the two were married between 1979 and 1994 or thereabout. They had children including the deceased. The defendant went off to marry Mutinda Musili about 1996. They had more children. At some stage Mwinzi with his siblings followed their mother in her new home.

The preponderance of evidence which this court believes as being true and consistent is that Mwinzi was born in 1982. His I.D. shown to court stated so – 3 years into the marriage of the plaintiff and the defendant. The defendant was being untruthful when she told the court that she married the

plaintiff while she was pregnant with the deceased. That would mean that she remained pregnant for 3 years! So far the largest data in medical science does not subscribe to such long period of pregnancy in human beings. Perhaps there could be a freak with the defendant as a subject but then evidence as to such was not place before court. The court did not believe that she married the plaintiff with - Mwinzi as a child either.

Whether the deceased followed her mother to Mutinda's home before venturing to Nairobi to look for employment or he finished school and left straight to go and look for a job is no matter. All the time he maintained his family names or as given to him by the plaintiff and at no time did he become a Mutinda child by custom or statutory adoption. The litigants herein never divorced at any time or according to the Kamba customary law under which they married. The plaintiff's people paid dowry for the defendant which her father PW2 accepted. The plaintiff never reclaimed his dowry to signify divorcing the defendant and no other man returned PW1's dowry to signify that he was marrying the defendant and taking along with her the children she bore with the plaintiff. It was being disrespectful of the defendant to brand her father a liar when he told the court that the plaintiff, and him alone, paid him dowry for her. The court did believe PW2 (Mwinzi Muli) as an honest and truthful old man, who came to assist the court. The rest of the defendant's witness on this subject could only be described as otherwise.

The defendant having lived in the home of Mutinda, now deceased could be more comfortable than when she lived with the plaintiff. But that did not mean that Mwinzi ceased to be the child of the plaintiff. There was no evidence to prove that. The court was not determining whether or not the deceased married Jackline Kamene. Or whether she should bury him or not. That was the tussle between the plaintiff and the defendant. The latter filed the counter-claim in these proceedings, as it were, for/on behalf of Jackline in that the deceased built a house in her compound and so he should be buried there. Both sides claimed that the deceased had a home in their respective compounds. However in the circumstances of this case, the court is inclined to order and it orders that the plaintiff do take the remains of the deceased and bury the same in his compound. May Mwinzi now rest for ever? It was not demonstrated that that would be repugnant to justice and morality so the counterclaim cannot gather much merit to be determined favourably on that score.

Without more the prayers in the suit are granted while the counterclaim is dismissed. This being a dispute between parents of a person who died, each side will meet its own costs.

Judgement delivered on 9.12.11.

J. W. MWERA
JUDGE