REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Appeal 36 of 2002

NECTOR LIYAI CHIVOLI
MACJAMES CHIVOLI LIYAI.....APPELLANTS
~VRS~
HUDSON NALWANG'A.....RESPONDENT

JUDGMENT

The Appellants Nector Liyai chivoli and Mac James Chivoli Liyali appeal against the judgment of Sirisia District Magistrate (Prof) in Civil Suit No.93 of 2002. In that suit the Respondent had sued the Appellants for dowry for his deceased daughter Anne Nalwanga who was allegedly married to the 1st Appellant under Luhya customary law. The 2nd Appellant was sued in his capacity as the father of the 1st Appellant as envisaged in Luhya customary law. The court found that there was marriage under Luhya customary law and ordered payment of dowry being: 2 goats, 2 blankets, 2 bedsheets, Ksh.20,000/= being mother's allowance, Ksh.30,000/= being father's allowance and Ksh.10,000/= for other expenses. The 1st Appellant was aggrieved by the judgment and appealed to this court.

The grounds of appeal are that the trial magistrate erred in finding that there was marriage under Luhya customary law contrary to the evidence. Secondly, that joining the 2nd Appellant in the proceedings as the father of the 1st Appellant is contrary to the existing Bukusu customary law. Thirdly, that the award of dowry was excessive and not consistent with the traditional law principles.

Mr. Onchiri took the court through the grounds of appeal. He submitted that there was no proof of marriage and that no dowry negotiations were held between the two families as required by the relevant customary law. The meeting which determined the dowry was not attended by the 1st Appellant and his family. It was important for an expert to be called to testify on the relevant customary law.

Mr. Kituyi for the Respondent submitted that the letter sent by the 1st Appellant to the Respondent informing him that the 1st Appellant was staying with the Respondent's daughter as his wife was sufficient proof of marriage. The consent to the marriage was express and the Respondent did not need to grant it. On death of the wife, the 1st Appellant obtained the burial permit and transported the body to Webuye District Hospital Mortuary. The Appellants were invited for the meeting which determined the dowry on 19/3/2001 but failed to attend.

The Plaintiff testified before Sirisia Court that his daughter Anne Nalwang'a who was at that time of the hearing deceased, was married to the 1st Appellant Nector Chivoli for 29/7/00. She died on 13/3/2001 while staying with the 1st Appellant. He produced a letter dated 20/01/2001 addressed to him by the 1st Appellant which was a report that 1st Appellant had taken his daughter as his wife. The letter further said that the 1st Appellant planned to solemnize the marriage in church should his plans work out. The 1st Appellant planned to visit the Respondent's home. It is important to note that the deceased died about one a half months later. The Plaintiff further testified that when his daughter died, it was the 2nd Appellant who informed him. The 1st Appellant transported the body to the Webuye District Hospital

mortuary for preservation. Later, the 1st Appellant helped to transport the body home for burial. Three days after burial, in a ceremony known as ***"lufu",*** a meeting by a committee of elders met to determine how much dowry was payable. The meeting was adjourned to 19/03/2001 for the deliberations. The Appellants though invited did not attend. The elders said that dowry should be paid consisting of 2 goats, 2 blankets, 2 bedsheets, Khs.50,000/= for mother and father's allowance and Ksh.10,000/= for expenses.

PW2, PW3 and PW4 supported the Plaintiff's testimony. PW5 said that he was sent to summon the Appellants for the dowry negotiation meeting but they refused to attend.

The 1st Appellant testified that he was staying with the deceased Anne Nalwang'a as a friend. He accommodated her as she searched for a job. Later, a close relationship developed. The 1st Appellant wrote a letter to the Respondent on his intention to marry the girl but he did not get a response. The girl was sickly and finally died. He arranged to move the body from Misikhu Hospital to the Webuye Mortuary for preservation as it awaited burial. The 1st Appellant denied there was any marriage.

The 2nd Appellant was non committal on whether a marriage existed or not. He said that the 1st Appellant was an adult and ought to bear his own burdens. The witness said that he assisted in the burial arrangements as a neighbour of the Respondent.

The magistrate in his judgment relied on the letter produced by the Respondent to find that there was a valid marriage between the parties under Luhya customary law. The court reasoned that the 1st Appellant had admitted writing that letter. He cited its contents to the effect that the 1st Appellant had taken Anne Nalwang'a as his wife from July, 2000. The Plaintiff's claim was wholly based on that letter. His witnesses testified in brief only saying that the Plaintiff's daughter was married to the 1st Appellant and that she later died buried and that the dowry payable was determined by elders. From the Plaintiffs' evidence there was no mention of what amounts to a Luhya customary law. I agree with the Appellants' counsel that such evidence was necessary to determine whether there was marriage because it had been disputed. It is not disputed that the two families never sat together to discuss marriage or negotiate dowry. The Appellant and his family skipped the meeting scheduled to determine the dowry after being duly notified. The mere act of staying together as husband and wife does not amount to a marriage under any customary law. It may be referred to as the common ***"come we stay"*** relationships. The procedure and requirements of the relevant custom as to what amounts to a marriage have to be complied with. The court must satisfy itself that all the necessary requirements have been satisfied before a marriage under customary law is declared. The parties stayed together for less than one (1) year and had no child. It is difficult to even assume that a marriage under common law existed from such a relationship. The 1st Appellant denied that there was a customary marriage between them. This denial would have challenged the Plaintiff to adduce cogent evidence in support of his case, if any.

The facts in the case of ***RE ESTATE OF KEBEYA (DECEASED) HIGH COURT NAIROBI CIVIL CASE NO.1403 OF 2001*** had different facts from the one before me. However, it exhaustively dealt with the issue of what constitutes to a Luhya customary marriage. The court held that negotiations between the two families have to take place and that the agreed dowry has to be paid by cattle or money, and that can be paid in installments commencing *before* (emphasis mine) the marriage and continuing afterwards. I associate myself with the findings of my senior sister judge Lady Justice Rawal.

I find that the magistrate erred both in law and fact by holding that a customary marriage existed between the 1st Appellant and Respondent's daughter. The finding was not supported by cogent evidence. The award of dowry to the Respondent was misplaced. I find the appeal merited and allow it accordingly. Each party to meet their own costs of this appeal.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 6th day of July, 2010 in the presence of Mr. Kituyi for the Respondent.

F. N. MUCHEMI
JUDGE