



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 77 of 1999

WILSON MWENJA KIAMBI APPELLANT

VERSUS

KARIUKI WARUIRU 1ST RESPONDENT

LUCY WANJA KARIUKI 2ND RESPONDENT

(Appeal from the Judgment and Orders of the Senior Resident Magistrate's Court at Kangema in Civil Case No. 39 of 1997 dated 29th April 1998 by H. N. Ndungu - SRM)

J U D G M E N T

This appeal is against the decision of Senior Resident Magistrate at Kangema (**H. N. Ndungu** presiding) delivered on 29th April 1998 in civil Case No. 39 of 1997. In that case the Respondents herein then as Plaintiffs jointly sued the Appellant then as defendant claiming pregnancy compensation under Kikuyu Customary Law. They claimed a total of 20 goats and 6 rams valued at Kshs.500/= and 15,000/= each respectively. They had claimed that on or about 11th November 1996 the Appellant had carnal knowledge of the 2nd Respondent a daughter of the 1st Respondent who was unmarried girl and as a result she became pregnant. In response however the appellant denied responsibility and claimed that the 2nd respondent was a person of loose morals and was out to tarnish his otherwise good name by associating him with a pregnancy he knew nothing about.

The case was eventually heard. The learned magistrate having considered the evidence adduced before her by both the appellant and respondents and their respective witnesses found for the respondents and ordered the appellant to pay

(a) 20 goats valued Kshs.500/= each – Kshs.10,000/=

(b) 6 rams valued Kshs.1,500/= each – Kshs.9,000/=

She also ordered the appellant to pay cost of the suit as well as interest.

The appellant being dissatisfied with the said judgment appealed to this Court and raised following grounds of appeal:-

- 1. The learned Senior Resident Magistrate erred in law and in fact in holding that the appellant had befriended the 2nd respondent and impregnated her whereas the issue was not properly canvassed.**

- 2. The learned Senior Resident Magistrate erred in law and in fact in that she did not appreciate the fact that the 2nd respondent is a stranger to the appellant.**

- 3. The learned Senior Resident Magistrate erred in law in that she failed to consider and take into account and or failed to give reasons why she disregarded the appellant's defence.**

- 4. The learned Senior Resident Magistrate erred in law in that she failed to give interalia points for determination, the decision thereon and the reasons for the decision as provided (sic) in law.**

- 5. The learned Senior Resident Magistrate erred in law and in fact in awarding pregnancy compensation and the quantum of the value of compensation is highly exaggerated and is not in accordance with Kikuyu Customary Law.**

Briefly the evidence tendered during the trial by the respective parties were along these lines:-

On 11th November 1996, the 2nd respondent fell ill. She informed her father, the 1st respondent that she was pregnant and that the person responsible was the appellant. 2nd Respondent then took her to Kihoya Private Clinic and thence to Kiria-ini Mission Hospital. On the way they met the Appellant who pleaded with them not to send elders to his home. Instead he was willing to come to the respondents' home and discuss the matter. He however never lived up to the promise. The 1st Respondent then despatched an elder **Francis Waithaka** (PW3) to the home of the appellant. The father of Appellant referred them to Assistant Chief and on 14th June 1997 the matter was heard by Assistant Chief. The appellant and respondents each brought along elders. The Assistant Chief and elders eventually ruled that the Appellant was responsible for pregnancy. The matter was further arbitrated upon by the Chief. However the appellant maintained that he was not responsible for the pregnancy. It was then that the respondents decided to file the instant suit.

The 2nd Respondent told the court that sometimes in 1995 she developed a relationship with the Appellant which lasted up to November 1996 when she became pregnant. When she informed the appellant of the pregnancy he told her to wait for him to put up a house and thereafter he would marry her. Later he backed out of the agreement and told her to abort the pregnancy instead. She refused and that is when the appellant owned up and informed her that it was in fact his father who had refused him to marry her as their two families had a grudge. In May, she fell ill and was rushed to hospital where she suffered a still birth.

PW3 **Francis Waithaka** testified that he had been sent as an elder to Appellant's home by the 1st Respondent. The father of Appellant however told him to refer the matter to assistant Chief. The matter was taken to Assistant Chief and Appellant was found liable. The appellant was not satisfied with

decision. They proceeded to the Chief who heard the dispute on 19th June 1997. The appellant admitted responsibility for the pregnancy and was sentenced to pay 20 goats and 6 rams in accordance with the Kikuyu Customary Law.

The Appellant in his defence stated that the 1st respondent went to their father's home claiming pregnancy compensation. Later the elders among them PW3 went to him to claim pregnancy. He requested them to come with the 2nd Respondent but this was not to be. He was later summoned by Sub-Chief and the Chief and no agreement was reached. He denied that he was a friend of the 2nd Respondent. If he was he would have married her.

From the foregoing it is common ground that the dispute between the appellant and respondent was about dowry compensation. It is also common ground that both the appellant and respondents come from the Kikuyu community. It is also common ground that among the Kikuyu a claim based on unlawful pregnancy can be maintained and whoever is found liable can be called upon to pay compensation in the form of goats and rams. It is also common ground that the respondents lodged their claim with the appellant. The dispute was subsequently adjudicated upon by the Assistant Chief as well as the Chief of the area. However the appellant was not satisfied with the outcome.

When the appeal came up for hearing **Mr. Wahome** and **Mr. Mwangi** appearing for the appellant and respondents respectively agreed to argue the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them together with the authorities cited. As this is a first appeal I am required to subject the evidence tendered at the trial to fresh and exhaustive evaluation so as to arrive at my own decision.

The Respondents instituted the suit against the Appellant claiming pregnancy compensation under the Kikuyu Customary Law. The issue of pregnancy compensation among the Kikuyu Community is a matter of public notoriety. In the case of **Ephantus Macharia Warui v/s Bernard Mutahi Ngumi and Teresia Wangari Mutahi (UR) Okwengu J** delivered herself thus:-

“..... Although no evidence was adduced to prove the Kikuyu Customary law on pregnancy compensation, I am satisfied that this is a matter of common notoriety”

The appellant did not dispute in his defence or evidence that pregnancy compensation was not payable under Kikuyu customary law. Nor did he plead that he was not Kikuyu so that Kikuyu customary law was inapplicable to him. Indeed it is common ground that the parties in this case are all from the Kikuyu Community and it therefore follows that the respondents' claim was competent and sustainable under the Kikuyu Customary Law.

Eugene Cotran in his book “**Restatement of African Law**” had this to say on the issue.

“Causing pregnancy of an unmarried girl”

Any person who makes an unmarried girl pregnant is liable to pay the girl's father a fixed amount by way of compensation under the Kikuyu law. The present compensation differs in various kikuyu districts as follows:-

Kiambu: *Eighteen goats, eight rams (30/= each), two*

rams (40/= each)

Murang'a: *Twenty goats, four rams (50/= each)*

Nyeri: *Twenty goats, one bull, one ram (60/=, one*

ram (50/=) and 30/= for beer

Embu: *Twenty goats, four rams.*

From the evidence on record which was largely unchallenged by the appellant there is no doubt at all that the appellant and 2nd Respondent were intimate friends and had known each other for a while. Out of that intimate encounter the 2nd Respondent got pregnant. She fingered the appellant as the culprit. The appellant's denial of respondents' claim was feeble to say the least. The 2nd respondent could not have just picked on the appellant for no apparent reason. Why couldn't she zero on any other person other than the appellant? There is evidence unchallenged as well that the 2nd respondent was at the time an unmarried girl. The 1st Respondent having gotten wind of his daughter's pregnancy approached the appellant and his parents for compensation. Before then the appellant had pleaded with the 2nd respondent to give him time to put up a house in which he would marry her. He also prevailed upon her and her parent not to send Elders to his parents as he undertook to resolve the matter amicably. There is also uncontroverted evidence of the dispute being addressed by the Assistant Chief as well as the Chief of the area and decisions arrived at. Those decisions did not however go down well with the appellant. It is noteworthy that the appellant's cross-examination of the respondents and their witness was very scanty and did not cast any doubts at all to the very credible evidence mounted by the respondents as aforesaid. There was evidence that the Appellant associated with the 2nd Respondent. No evidence was given that the 2nd respondent associated with any other man. There was sufficient corroboration in evidence tendered by the Respondents.

As correctly submitted by **Mr. Mwangi**, he who asserts must prove. The Appellant's assertion in his defence that the 2nd Respondent was a person of loose morals was not at all proved. He never pointed to any other man or men that could have slept with the 2nd respondent as caused her the pregnancy. The upshot of the foregoing is that the evidence of the respondents was essentially unchallenged and therefore believable.

The learned magistrate wrote a short and terse judgment. She could have done better. However the judgment did capture the very essence of the dispute. Contrary to the submissions of the appellant the judgment though not in strict conformity with the requirements of order xx rule 4 of the Civil Procedure rules, nonetheless addressed the issues in dispute.

In summary therefore there was unassailable evidence that the 2nd Respondent became pregnant out of a relationship with the appellant. She was unmarried girl. Accordingly, the respondents were entitled to compensation. The eventual award was in accordance with the law. I see no reason therefore to depart from the findings of the learned magistrate.

The respondents' have asked me to vary the monetary value attached to the goats and rams by the learned magistrate. According to the respondents the value for a goat of Kshs.500/= was too low as the present value is Kshs.3,000/= to Kshs.5000/=. The value for a ram at Kshs.1,500/= was also very low as the present value ranges between Kshs.6000/= and Kshs.10,000/=. My answer to this invitation is that the respondents did not cross-appeal. Secondly, even if the cross-appeal was unnecessary, I would still turn down the invitation on the basis that no cogent evidence as to the current market value of the goats and rams was tendered. Finally it was the respondents who attached the value they now seek to impugn in the plaint they filed.

That being my view of this appeal, I find that it lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Nyeri this 19th November 2009

M. S. A. MAKHANDIA

JUDGE