



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Appeal 44 of 2002**

**ELIJA GATIMU )**

**EUNICE WAIRIMU) .....APPELLANTS**

**VERSUS**

**JULIUS NDUMBI)**

**SAMUEL RIKA ).....RESPONDENT**

***(From original Judgment in Civil Case No.33 of 2001 in the Senior Principal Magistrate's Court at Murang'a by L. Nyambura - RM)***

**J U D G M E N T**

Mr. Elijah Gatimu and his daughter, Eunice Wairimu hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively sued Mr. Julius Ndumbi and his son, Samuel Rika, hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively in the Senior Principal Magistrate's court at Murang'a seeking;

- a) Payment of live 20 goats and 6 rams or their monetary market value,
- b) Costs of this suit,
- c) Interest of the above from the date of judgment to payment in full,
- d) Any other or further relief the Honourable court may deem just to grant.”

The appellants claim was premised on the alleged unlawful sexual intercourse between the 2<sup>nd</sup> appellant with the 2<sup>nd</sup> respondent that resulted in the 2<sup>nd</sup> appellant be getting a child by the name Margaret Njeri. In a nutshell, the appellants claim was for compensation by respondent under Kikuyu customary law for unlawful pregnancy.

The respondents responded to the appellants' claim in the flowing manner; that they could not be held jointly liable for an act committed by one of them when they were all adults, that in any event the claim is unsustainable as the 2<sup>nd</sup> appellant and 2<sup>nd</sup> respondent were husband and wife by the time the 2<sup>nd</sup> appellant got pregnant. Finally they also pleaded that it was the 2<sup>nd</sup> appellant who disappeared from the

matrimonial for no apparent reason.

Having listened to the case, the learned Magistrate found no merit in the claim and accordingly proceeded to dismiss it. The appellants were aggrieved by the dismissal of their claim and hence preferred this appeal. In their memorandum of appeal drawn by Messrs Gacheru J. & Co. Advocates, the appellants raised 4 grounds of appeal to wit that:-

“1.The learned trial magistrate erred in failing to award pregnancy compensation which was admitted by the respondent.

2. The learned trial Magistrate failed to comply with customary law where upon if no dowry is paid the appellants were entitled to compensation.

3. The learned trial Magistrate failed to award dowry compensation or pregnancy compensation for no reasons at all.

4. The learned trial Magistrate failed to arbitrate the issues and dismissed the appellant’s suit for no reasons at all.”

In summary, the evidence tendered in the lower court in support of the appellants claim was that the 1<sup>st</sup> appellant was the father of the 2<sup>nd</sup> appellant. That the 2<sup>nd</sup> respondent unlawfully on unknown dates had sexual intercourse with the 2<sup>nd</sup> appellant as a consequence whereof the 2<sup>nd</sup> appellant got pregnant outside marriage. She gave birth to a child who was named after the 2<sup>nd</sup> respondent’s mother. Under Kikuyu customary law, the 1<sup>st</sup> appellant was entitled to be compensated by the 1<sup>st</sup> respondent for the unlawful pregnancy. As for the respondents, their evidence was along the following lines; that the 2<sup>nd</sup> respondent admitted to having had sexual intercourse with the 2<sup>nd</sup> appellant and getting her pregnant. However this was because he considered the 2<sup>nd</sup> appellant his wife. They had stayed together as husband and wife between July, 1998 and December, 1998 when she ran away from the matrimonial home. Accordingly the appellants were not entitled to any compensation as the 2<sup>nd</sup> appellant was a wife to the 2<sup>nd</sup> respondent. They can only be sued for non-payment of dowry and not pregnancy compensation.

When the appeal came up for hearing before me, Mr. Gacheru, learned counsel appeared for the appellants. The respondents though served with the hearing notice did not bother to appear to respond to the appeal. Mr. Gacheru suggested that he be allowed to argue the appeal by way of written submissions. The court acceded to the request and stood over the hearing of the appeal to 22<sup>nd</sup> November, 2007 to enable the appellant’s counsel to file his written submissions. Come the said date and the appellant’s written submissions were not ready. However, the respondents suddenly appeared and urged me to allow them to put in their written submissions as well. I allowed their request. Subsequent thereto both the appellants and respondents filed their written submissions which I have carefully read and considered.

I am aware that as a first appellate court, I am entitled to subject the evidence tendered in the subordinate court to fresh evaluation and analysis so as to reach my own decision. I should however by wary to interfere with the trial court’s findings unless I am satisfied that either there was absolutely no evidence to support the findings or that the trial court must have misunderstood the weight and bearing of the evidence before it and thus arrived at unsupportable conclusion. See generally Peters V Sunday Post Ltd (1958) E.A 424.

In dismissing the appellants’ claim the learned Magistrate delivered herself thus;

“.....pregnancy compensation is awarded when the man responsible refuses to marry the woman (girl) that he has impregnated. In this case 2<sup>nd</sup> plaintiff had been staying with 2<sup>nd</sup> defendant as husband and wife. She moved out of the said arrangement voluntarily. She cannot claim that 2<sup>nd</sup> defendant refused to marry her. For the above reasons the court finds that the defendants herein are not liable to compensate the plaintiffs.....”

I totally agree and endorse this reasoning by the learned Magistrate. The issue of unlawful sexual intercourse cannot arise as there is evidence that the sexual intercourse that resulted in the pregnancy of the 2<sup>nd</sup> appellant was consensual. The 2<sup>nd</sup> appellant was at the time staying with the 2<sup>nd</sup> respondent as his wife. It is common ground therefore that the 2<sup>nd</sup> respondent and 2<sup>nd</sup> appellant cohabited as man and wife from mid 1998 to December, 1998. That as a result of the said cohabitation a child was born. It is also common ground that though the 2<sup>nd</sup> appellant and 2<sup>nd</sup> respondent were cohabiting as aforesaid no dowry had been paid to the 1<sup>st</sup> appellant by the 1<sup>st</sup> respondent as required by kikuyu customary law. Finally it is also common ground that no Kikuyu customary marriage rites such as *Njurio*, *uracio* or *Ngarario* were undertaken.

Much as no dowry was paid and the above kikuyu customary marriage rites undertaken, its instructive that the 2<sup>nd</sup> appellant considers herself a wife of the 2<sup>nd</sup> appellant. In her own testimony she stated;

“.....I was married to 2<sup>nd</sup> defendant in June 1998. I stayed with him as husband and wife until I gave birth on August 1998. My daughter is called Margaret Njeri named after the mother of the 2<sup>nd</sup> defendant my husband. 2<sup>nd</sup> defendant did not take dowry to my parents.....I am the wife of the 2<sup>nd</sup> defendant..... He should pay dowry to my father.....I still consider myself as the wife of the 2<sup>nd</sup> defendant.....”

From this evidence, it is clear that the appellants' claim was misplaced. They should perhaps have sued the respondents for non-payment of dowry. It is the appellants' claim that since no dowry was paid and kikuyu customary marriage rites performed, the sexual intercourse between the 2<sup>nd</sup> appellant and 2<sup>nd</sup> respondent that resulted in a child was unlawful. I am not aware of any time frame within which dowry should be paid and or Kikuyu customary marriage rites performed. In any event the cohabitation between the 2<sup>nd</sup> appellant and 2<sup>nd</sup> respondent was for a short period before the 2<sup>nd</sup> appellant ran away from the matrimonial home. I do not think that such short period of time was sufficient to enable the respondents to undertake dowry negotiations and to perform the necessary kikuyu customary marriage rites. Further I do not think that the respondents should be penalized for the acts of the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> respondent did not chase away the 2<sup>nd</sup> appellant. It is the 2<sup>nd</sup> appellant who on her own free will ran away from the matrimonial home. The 2<sup>nd</sup> respondent still considers the 2<sup>nd</sup> appellant his wife. Similarly the 2<sup>nd</sup> appellant still considers herself a wife of the 2<sup>nd</sup> respondent and she is even willing to resume cohabitation once dowry is paid. In these circumstances how then can she and her father claim that the sexual intercourse between the two was unlawful.

I am aware that in the case of Mwagiru V Mumbi(1967) E.A 639, it was held that evidence as to the formalities required for a customary law marriage must be proved to the required standard. Similarly in the case of Githanja V Githanja (1982) KLR 575 it was held that the existence of marriage is a matter of fact which is proved with evidence of one aspect whether “*Ngurario*” was performed. However, as I have already stated the cohabitation was brief and it may not therefore have been possible for dowry to be paid and *Ngurario* rite to be performed. Further I am not aware of the requirement that before *Ngurario* is performed or dowry paid parties cannot cohabit as man and wife. These rites can be performed as parties continue cohabiting as man and wife. Payment of dowry for instance is I think a continuous process.

All said and done, I think the learned Magistrate was right in dismissing the appellants' claim. Indeed their claim, if any, lay in suing the respondents for non-payment of dowry. Accordingly I see no merit in this appeal and it is hereby dismissed with costs to the respondents.

*Dated and delivered at Nyeri this 31<sup>st</sup> day of January, 2008.*

**M.S.A. MAKHANDIA**

**JUDGE**