REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 81 of 2000

SOSPETER MURIMI MBOGO ..... APPELLANT

VERSUS

MWANGI CHEGE)

JANE WANJIRU MWANGI) ..... RESPONDENTS

(Appeal from original Judgment of the Principal Magistrate's Court at Murang'a in Civil Suit No. 65 of 2000 dated 15th September 2000 by J. B. A. Olukoye – R.M.)

J U D G M E N T

Sospeter Murimi Mbogo, hereinafter referred to as "*the appellant*" was the defendant in a suit filed in the Principal Magistrate's court at Murang'a against him jointly by **Mwangi Chege** and **Jane Wanjiru Mwangi** hereinafter referred to as "*the respondents.*" In that suit, the respondents claimed against the appellant; 90 goats, 3 cows, 3 rams and 3 beer parties at their present market value and in the alternative 20 goats and 6 rams also at their market value. They also claimed costs of the suit and any other or further relief that the honourable court deemed just to grant.

The respondents' suit was informed by the following undisputed facts. The respondents are father and daughter respectively. The appellant had for ten years "married" and cohabited with the 2nd respondent as husband and wife. Indeed out of that union they sired three children. However throughout that cohabitation, the appellant did not deem it worthwhile to pay dowry to the 1st respondent as is required under Kikuyu customary law. On or about March 1989 the appellant allegedly chased away the 2nd respondent from the matrimonial home when she protested at the appellant's desire and intention to marry a second wife. However according to the appellant the 2nd respondent left the matrimonial home on her freewill. Since leaving the matrimonial home, the 2nd respondent had retreated to her parents home where she resides with the children of the marriage. This state of affairs did not please both respondents. If anything it irked them. It was for that reason that they filed the suit claiming 90 goats, 3 cows, 3 rams and 3 beer parties being dowry payable, or in the alternative 20 goats and 6 rams as pregnancy compensation in line with the Kikuyu customs.

The appellant conceded to having "married" the 2nd respondent, had 3 children out of the union and had also not paid dowry. He was nonetheless prepared to pay the dowry if and only if the 2nd respondent was to go back to the matrimonial home.

The respondents testified in support of their case. Their evidence was as summarised above. The

appellant too testified and called his mother as witness. Their evidence too was along the lines outlined above. The learned magistrate having considered and evaluated the evidence on both sides came to the conclusion that the respondents had proved their case against the appellant on the balance of probability and entered judgment in their favour in the following terms:

"**..... Accordingly judgment is entered for the Plaintiffs jointly and severally against the defendant in terms of the plaint plus costs and interest thereon from the date of judgment until payment in full .....**"

The appellant was aggrieved by the said judgment, hence he preferred the instant appeal through **Messrs Kirubi, Mwangi Ben & Co. Advocates**. By a Memorandum of appeal dated 11th October 2000 and filed in court on the same day, the appellant faults the learned magistrate's judgment on the following grounds:

1. The learned magistrate erred in law and fact in delivering an ambiguous and unexecutable judgment.

2. The learned magistrate erred both in law and fact in awarding the respondents prayer (as of the plaint in its entirety without specifically stating which limb of the said prayer was proved by the respondents to the standards required in law.

3. The learned magistrate erred in fact in awarding a judgment based on Kikuyu customary law without corroborative evidence of an expert in Kikuyu Customary law.

4. The learned magistrate erred both in law and fact in awarding judgment to the respondents which was against the weight of the evidence.

When the appeal came up for hearing on 17th June 2008, the appellant and respondents were represented by **Mr. Mwangi** and **Mr. Munene** learned counsels respectively. On their own volition they indicated to the court that they wished to argue the appeal by way of written submissions. The court was not averse to the idea. Accordingly a consent order was recorded in those terms. Subsequent thereto, respective parties filed and exchanged written submissions which I have carefully read and considered.

It is now trite law that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial court particularly if such findings are based on the demeanour of witnesses as observed by the trial court and its general appreciation of the evidence in the case. But if the trial court has failed to appreciate the weight or bearing of the circumstances admitted or proved, then an appellate court is entitled to interfere even with such findings of fact – See **Peters v/s Sunday Post Limited, (1958) E.A. 423**.

In the plaint the respondents had in the main prayer sought 90 goats, 3 cows, 3 rams and 3 beer parties at their market value. This was for dowry in accordance with Kikuyu customs and rites. In the alternative, the respondents prayed for 20 goats and 6 rams also at their market value being pregnancy compensation. In entering judgment as prayed, the learned magistrate failed to indicate whether the judgment was for payment of dowry or for pregnancy compensation or for both claims. The learned magistrate also failed to indicate and or assign in the judgment what the market value should be placed on the goats, cows and beer parties claimed by the respondents. The prayers granted by the learned magistrate were therefore ambiguous and incapable of enforcement. The learned magistrate ought to have indicated in her judgment that she had either granted the main prayer or the alternative prayer but not both. She ought also to have placed a figure being the market price for goats, cows, rams and three beer parties claimed by the respondents. If the respondents were to execute the decree the way it is, how will they know what the market price for the aforesaid livestock and 3 beer parties is? Will they simply pluck a figure from the air and place it as the market price? Further when extracting the decree what figure will the court place as the market value in the absence of specific order and or finding by the learned magistrate. Further assuming that the respondent somehow successfully managed to extract the decree and served it upon the appellant for compliance how would he comply with the same in the absence of stated market value of those things awarded as per the judgment, more so if he does not have the livestock of his own.

This suit was in the nature of a claim based on special damages which as the law requires must be specifically pleaded and proved. Much as the special damages were pleaded, I am in doubt as to whether the claim was specifically proved contrary to the finding of the learned magistrate. The respondents were represented by counsel and it behoved them to bring such evidence as to prove specifically their claim whether it was for payment of dowry or pregnancy compensation. Indeed the respondents should have made an election either to pursue payment of dowry or pregnancy compensation and bring forth evidence in support of the election they had made. It was not right to lead evidence touching on both aspects of the matter and leave it to the learned magistrate to wriggle out of such absurd situation. I suspect that it was for this reason that the learned magistrate found an easy way out by simply saying that judgment is entered in terms of the plaint. The respondents as it is therefore may have failed to prove to the required standard that either dowry or pregnancy compensation was payable by the appellant, much as the appellant admitted his liability to pay dowry on condition that the 2nd respondent returned to the matrimonial home. It is upon a litigant to be specific on what he wants the court to do for him and not to leave it to court to guess, speculate and or assume exactly what the litigant expected of the court. In essence this is what the respondents have done in the circumstances of this case.

According to counsel for the respondent, he is of the view that the respondents proved that the appellant was liable to pay dowry in the event that he wanted the 2nd respondent to be his wife and pregnancy compensation in the event that he did not want her again. According to counsel, dowry as per Kikuyu Customs is payable to a girl's parent once a boy initiates marriage process and starts to cohabit with a girl. However respondent's counsel countered this submission by stating that the respondents never called an expert on Kikuyu Customs who should have shed light as to when and how dowry is payable to the father of a married daughter. That evidence of the 1st respondent could not be acted upon alone without independent and expert evidence. The court too could not have been asked to take judicial notice of such practice among the Kikuyu. According to the appellant's witness dowry is paid when the wife is staying with the husband and not when the parties are separated. Finally counsel pointed out that the respondents could not sue for pregnancy compensation. Pregnancy compensation is payable when a man has unlawful sexual intercourse with unmarried girl without the father's consent. It is not payable if the children were sired when the couples were married as such an act is legal. Furthermore, counsel went on to submit, dowry is not a one day affair. It is a continuous affair so long as the couples remain married and it has no specific time frame when it should start and when it should stop.

In my view these were live issue in the case which the learned magistrate ought to have addressed her mind to before reaching her decision. She should have asked herself whether dowry was still payable to the 1st respondent when the 2nd respondent had left the matrimonial home together with all the children of the marriage. She should also have asked herself whether under Kikuyu customs, the appellant's offer to pay the dowry once the 2nd respondent resumed cohabitation was a valid requirement or demand. Finally she should have asked herself whether pregnancy compensation is permissible under kikuyu custom if the said pregnancy occurred when the parties were cohabiting as man and wife or holding themselves out as such. The only reason why I am raising this issue is that there was need for the respondents to avail an expert witness on kikuyu customs to shade light on all these issues which were raised in the pleadings and the evidence tendered to enable the trial court to reach a just decision in the matter. I do not think that the evidence of the parties was sufficient to sway the court either way, for it was bound to be self-serving. The court too should have insisted on the evidence of an expert in Kikuyu Customs.

For all the foregoing, I am satisfied that this appeal has considerable merit, accordingly, I allow it and set aside the order of the learned magistrate entering judgment for the respondents. However, since the main culprit in this appeal was the learned magistrate in the manner in which she crafted the judgment and the final orders made, I will not substitute her said order and or decree with an order of dismissal of the suit. Instead and pursuant to the provisions of section 78 of the Civil Procedure Act and Order XLI rule 21 of the Civil Procedure Rules, I order that the case be retried in the principal magistrate's court at Murang'a before any other magistrate of competent jurisdiction other than J.B.A. Olukoye who presided over the initial trial. I make no order as to costs in this appeal.

Dated and delivered at Nyeri this 29th day of September 2008

M. S. A. MAKHANDIA

JUDGE