



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

Civil Appeal 20 of 2003

CORNELIUS KAUNGUJA M'ALAINÉ APPELLANT

VERSUS

DAVID KAILIKIA M'IMATHIU RESPONDENT

(An appeal from the judgment of District Magistrate at Tigania Law Courts on 18th February, 2003 in RMCC NO.6 of 2002)

JUDGMENT

The facts in this appeal are that the appellant paid dowry on behalf of his son to the respondent whose daughter the appellant's son wanted to marry. He paid a cow, three she goats and one he goat.

After these traditional formalities the respondent's daughter moved to the appellant's home in May, 1999. Approximately four (4) months later, according to the appellant the respondent sent for his daughter.

But according to the respondent his daughter and the appellant's son voluntarily moved to his home (respondent's) on account of his daughter's ill health.

The girl eventually died while at her parents' home and was buried at the hospital without the involvement of the appellant's family. At the time of her death she did not have any child with the appellant's son, although there was allegation that she was expectant at the time of her death.

The appellant demanded the return of the dowry in accordance with the Ameru Customary Law. This was the dispute that was first referred to the elders, Njuri Ncheke and finally brought to court, the contention being that the appellant is not entitled to a refund of dowry as the respondent did not take his daughter away and also because the girl died while pregnant with the appellant's son's baby.

Both parties called evidence to the effect that the dowry claimed was paid to the respondent and also evidence on the applicable customary law.

The trial court found that the girl having died while at her parents' home and having died childless, the appellant was entitled to one cow the cost of which the court estimated as Kshs.15,000/= and ordered the respondent to pay this to the appellant.

The appellant being dissatisfied with this preferred this appeal, listing not less than 12 grounds. First and foremost, there is no dispute that the appellant's son got married to the respondent's daughter. There is also no dispute that dowry in the form of 3 she goats, one he goat and a cow was paid. There is evidence

on record that the cow gave birth.

Another undisputed fact is that the respondents' daughter went back to her parents' home where she finally died. What is in dispute is how she went to her parents' home. This is an important question as the refund of the dowry will depend on whether she was taken by her father, the respondent.

The trial court did not make specific finding on the issue but based its decision on the fact that the girl died without a child. While that finding was also relevant in deciding the dispute, the trial court ought to have made a finding on how the girl found herself at her parent's home. If she was taken there by her husband and on a common understanding, and voluntarily then the appellant would not be entitled to a refund. But if she left on her own or at the instance of the respondent then the appellant would be entitled to a refund. The husband did not testify. I am persuaded, on my part that the respondent did not play any role in the return of his daughter to his home.

The appellant's evidence on how the girl left his home is contradictory. On the one hand he states that the respondent went for his daughter personally and on the other hand he says that the respondent sent for his daughter. What appears to be the true position is that the girl became sickly after marrying the appellant's son. It must have been agreed by consensus that she goes back to her parent's to recuperate. Unfortunately she died. The appellant and his son did not display any sign of concern. After abandoning the girl at her parent's home, they made no follow up on her progress. The girl lived at her parents' home for 1 year before her death.

Towards the end of her life the appellant or his son did not bother about her, hence her burial at the hospital. Having thus found, the only question left is whether the appellant is entitled to a refund of dowry. Evidence of the applicable customary law was led to the effect that dowry is never refunded in case of death of a girl who has no children (see the testimony of the respondent). DW2 – Silas Laibuni's evidence was to the effect that dowry will also not be refunded if a married woman dies at her matrimonial home and if pregnant.

He also stated that where a married woman dies without a child, part of the dowry will be returned, but normally goats and rams are never returned. The appellant himself based his claim on the fact that when a married woman dies at her parent's home, part of the dowry is refundable. He also testified that if the son's wife had given birth he would not be entitled to a full refund, but only half of it.

The courts are guided by African Customary Law in civil cases in which one or more parties is subject by virtue of S.3(2) of the Judicature Act. What emerges from the evidence on record is that where a married woman runs away and returns to her parents, the latter will refund to her husband the full dowry if she does not have children. But if she has children, or died when pregnant only half of the dowry will be refunded.

But where a married woman dies without a child, only cows will be returned and not goats and rams.

In the appeal before me the girl was returned to her parent's home. She died without a child. In the circumstances of this case and in all fairness, it would be unconscionable to order the respondent to refund dowry.

In the result I allow the appeal with costs to the respondent.

Dated and delivered at Meru this 11th day of October, 2007

W. OUKO

JUDGE