REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 39 OF 2006

(Appeal against the decision of Mr. E. O. Obaga, SRM in Kakamega Chief Magistrate's Court in Civil Case No.525 of 2004)

ESTHER MMBONE ……..……..……..…….. APPELLANT

V E R S U S

WILLIS MUHATI ……..…. RESPONDENT

J U D G M E N T

This is a judgment in the appeal by Esther Mmbone (the Appellant) against the judgment of the learned trial magistrate E. O. Obaga, Senior Resident Magistrate, delivered on 30-5-2006 in Kakamega C.M. civil Suit No.525 of 2004 in which the trial court found and held that the daughter of the appellant, one **Justin Igaida**, now deceased, was legally married to the Respondent in this appeal, **Willis Muhati**, and consequently, having so found, the trial court ordered that the Respondent was entitled to bury the remains of the Appellant's said daughter.

The appellant proffered 6 grounds of appeal as follows:-

1. THAT the learned trial magistrate erred in law and infact in finding that there was a legal marriage between the deceased and the defendant contrary to the evidence on record.

2. THAT the learned trial magistrate erred in law and infact in finding that dowry paid to Ronald Agade was valid contrary to the evidence on record.

3. THAT the learned trial magistrate erred in law and infact in holding that the plaintiff did not establish the existence of dowry payment custom known as Amavihu in Maragoli custom contrary to the evidence on record.

4. THAT the learned trial magistrate erred in law in mixing custom issues and matters of fact hence arriving at wrong decision.

5. THAT the learned trial magistrate erred in law and infact in finding that Ronald Agade was the father of the deceased contrary to evidence on record.

6. THAT the learned trial magistrate erred in law and in holding that the plaintiff could not have told the brother of the paternity of her child contrary to the evidence on record.

The claim giving rise to the judgment by the trial court had been commenced by plaint in which the Appellant as Plaintiff had sued the Respondent, as Defendant seeking orders to restrain the Respondent from burying the remains of Justin Igaida and to have such remains released to her for burial.

The main issue on which the case was decided in the trial court was the existence of a valid marriage between the deceased and the Respondent. The trial court found that there existed a valid marriage and consequently gave orders allowing the Respondent to burry the remains of his late wife.

Aggrieved by the decision, the Appellant filed the appeal herein. Mrs. Osodo argued grounds 1, 2, 3 and 4 of the appeal together and grounds 5 and 6 together as one. The main thrust of her submissions was that customary law rites had not been performed and no valid marriage subsisted between the deceased and the Respondent. In particular, Mrs. Osodo alluded to the absence of "**AMAVIHU"** which, she said, the Appellant had given evidence on in the trial. Further, "**ASANTE YA MATITI"** had not been made prior to the alleged marriage, she submitted. She contended that the Appellant had long separated with one **Ronald Agade Zacharia**, DW2, who claimed to have married the appellant and to have sired with her the deceased as well as one **Pauline Musimbi Agade**. It was Mrs. Osodo's submission that the Appellant had testified that she had separated with Ronald Agade Zacharia long before the deceased was born and as DW2 was not her father, dowry could not be discussed with DW2 to her exclusion. It was contended by Mrs. Osodo that the trial court erred in not holding that DW2 was not the biological father of the deceased. The Appellant's evidence was that the deceased was sired by another man known as **Paul Kajoya** after the Appellant separated with Ronald Agade Zacharia. Paternity in customary law, said Mrs. Osodo, determines validity of marriage and a person who is not a father cannot negotiate dowry otherwise the dowry arrangement will be null and void. No matter the amount of documents to prove that the deceased and the Respondent were a man and wife, without customary rites, no marriage can exist, contended Mrs. Osodo.

Mr. Mukavale, learned counsel for the Respondent opposed the appeal. He contended that there was sufficient evidence to prove that a marriage under the Luhya Customary Law existed between the deceased and the Respondent. He relied on the evidence of DW1, the Respondent, and DW2, DW3, Ronald Alusa, who worked with the deceased who was a nurse at Mbale Rural Health Centre, produced documents to show that the deceased was married to and was the wife of the Respondent.

I have perused the pleadings and the evidence and judgment of the learned trial magistrate. I have also given due consideration to the able arguments of both counsel for the parties. The suit in the lower court was commenced by the Appellant. The Appellant therefore assumed the burden and responsibility of proving that there was no marriage between her deceased daughter and the Respondent. It was common ground that if there was a marriage, it was under the Luhya Customary Law of the Maragoli. It was incumbent upon the Appellant to adduce expert evidence through elders who were well versed with the customs of the Maragoli to testify whether the parties had observed the requisite rites. There was no presumption that there was no marriage and therefore the burden reposed on the appellant to prove on the balance of probabilities that the deceased was not married to the Respondent. The witnesses who testified for the Appellant were not expert witnesses and it is not clear what rites were vital to constitute a customary law marriage under the Maragoli customs and without which marriage under the custom would not ensue.

The evidence adduced by the Respondent seemed to show that the deceased conducted herself as the wife of the Respondent and there existed those attributes that go with married couples. I have carefully perused the judgment of the learned trial magistrate and I think he very carefully analyzed the issues and the evidence adduced by the parties. He came to the correct conclusion in the suit. The Appellant, in my view, did not discharge her burden, by showing on the balance of probabilities that the deceased was not married to the Respondent. I do not find merit in the appeal which I dismiss. The Respondents shall have the costs of the appeal.

Delivered, dated and signed at Kakamega this 22nd day of November,. 2007

G. B. M. KARIUKI

J U D G E