REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Appeal 1 of 2005

SAMUEL KANYUA NGANGA ……...…….APPELLANT

VERSUS

MILKA WAIRIMU GAKUYA……RESPONDENT

JUDGEMENT

This is an appeal from the decision of the Chief Magistrate at Thika (M.J.W.. Mugo) in Thika CM Maintenance Cause No. 4 of 1975 delivered on 2nd December 1997. The appeal was filed by Machiria Kahonge & Company advocates on behalf of the appellant. The appeal is based on four grounds that –

1. The learned magistrate erred in finding for the respondent although it was clear that according to Kikuyu customary law no marriage was proved.

2. The learned magistrate erred in law in awarding maintenance to the respondent more so for herself and her child.

3. The learned magistrate erred in ordering maintenance although no evidence was adduced in that regard and without giving sufficient reason.

4. The learned magistrate had no jurisdiction to hear the cause.

At the hearing of the appeal 30/3/2006, Mr. Owaga appeared for

the appellant, while Ms. Wangare appeared for the respondent. Mr. Owaga submitted that no Kikuyu customary marriage was proved as the ceremony of Ngurario was not performed. That the respondent did not file a response to defence, to controvert the defence, so she should have been taken to have admitted the defence. He also argued that the subordinate court did not have jurisdiction to entertain the complaint. In his view, the complainant should have gone to court by way of a Plaint as required under the Marriage Act (Cap 150), and African Christian Marriage & Divorce Act (Cap. 151). He further argued that the magistrate did not give any reasons for her findings. There were no income and expenditure statements to justify the magistrate's findings. The conclusions of the magistrate were without facts.

Miss Wangare for the respondent, contended that the appellant and the respondent were married. The appellant did not deny the marriage in his defence. On whether the respondent should have filed a reply to defence, she submitted that, such failure was in the nature of want of form. It was no basis for invalidating pleadings under Order 6 rule 13 Civil Procedure Rules. She also submitted that there was no legal requirement that income and expenditure of the respondent should have been pleaded. In any event, in her contention, what way awarded was too little.

This being a first appeal, I am bound to re-evaluate the evidence on record and come to my own conclusions and inferences.

In brief this matter was filed in the Senior Resident Magistrate's Court Thika, as a separation and maintenance cause. It was filed through a complaint. It was filed on 28/7/1995. The averments in the complainant were that the appellant was married to the respondent in 1993 under Kikuyu customary law and they had one young child, who was 1 year and 3 months old then. That on 28th May 1995 the appellant chased away the respondent from the matrimonial home. That the appellant was a successful farmer and had a tailoring businessman, earning over Kshs.6,000/= monthly, and a yearly bonus of Kshs.35,000/= from tea sales. The respondent asked for the court's orders for custody of the child; payment by the appellant of a monthly sum for the maintenance of the respondent and child; and also that the appellant be ordered to educate the child of the marriage.

The appellant filed a defence. He stated that it was in fact the respondent who had been mistreating the appellant with cruelty by hurting him with burning wood and a knife, and trying to poison him. He also averred in the defence, that it was the respondent who ran away after trying to poison him through porridge. He also averred in the defence that the properties alleged to belong to him, belonged to his father. He admitted the jurisdiction of the court. During the hearing of the case, the respondent testified that she was married to the appellant under Kikuyu customary law. They had one baby boy. That the appellant chased her away. She called one witness, who was her father (PW2) who testified to the existence marriage. He testified that not all the Kikuyu customary marriage ceremonies were conducted ceremonies, Ngoima was not slaughtered.

The appellant also testified. He stated that he stayed with respondent as husband and wife. That they got one baby boy. That the respondent left him and he would not accept her back. That he knew that the respondent wanted to be paid compensation.

The learned magistrate, on the evidence on record, found the appellant guilty and ordered him to maintain his wife with monthly instalments of Kshs.500/= and monthly instalments of Kshs.500/= for the maintenance of the child, totaling Kshs.1000/= per month. The instalments were to commence on 23rd November 1993.

Now, the appellant has come to court in this appeal, challenging the learned magistrates decision.

The first issue for consideration is whether there was a valid Kikuyu customary marriage. Though the appellant is denying the existence of the marriage in the appeal, he did not deny the marriage in the defence or in his evidence. In fact, in his evidence, he said that they stayed with the respondent as husband and wife from 23/11/93 to May 1995. That is a clear admission of the marriage. The respondent cannot be heard now to challenge the existence of the marriage on appeal, while he admitted its existence during the trial. I find that, indeed, there was a Kikuyu customary marriage between the appellant and the respondent. The fact that Ngoima was not slaughtered, does not help the appellant as he admitted the existence of the marriage in his own testimony before the learned magistrate.

The appellant has also challenged the jurisdiction of the subordinate court, saying that the respondent should have gone to court by way of a plaint, not by way of a complaint. Again, the appellant admitted the jurisdiction of the subordinate court in paragraph 7 of his defence. Jurisdiction should have been denied in the trial court. He cannot be heard to dispute the jurisdiction on appeal, while he admitted the jurisdiction in his own defence. I find nothing in Marriage Act (Cap 150) or the African Christian Marriage and Divorce Act (Cap 151) that says that the respondent should have filed a plaint instead of a

complaint.

The only issue of substance, is the award of learned magistrate which the appellant has challenged. The challenge is based on the contention that the award was not based on evidence that was before the magistrate.

The prayers in the complaint, inter alia, asked the court to order the appellant to pay such monthly sum as the court shall consider reasonable with such further sum for maintenance of the complainant and her child. Also that the appellant be ordered to educate the child of the marriage by paying school fees.

In the evidence before the learned magistrate the respondent did not refer to any paragraph of the plaint. She merely for payment of dowry. She stated in her evidence –

"**I got married in accordance with Kikuyu customary law. He came for me and sent an elder. He paid dowry of Kshs.4500/=. No slaughter of a goat was done. I would like the respondent to pay me dowry for staying with me. We got a child together, a baby boy"**

On this evidence, the learned trial magistrate found that the respondent wanted to be maintained together with the child. He awarded Kshs.500/= monthly for the respondent and Kshs.500/= monthly for the child totaling Kshs.1000/= per month, payable from 23rd November 1993.

In my view, the learned magistrate erred in making the award for maintenance. Firstly, there was no evidence that the respondent asked for maintenance for herself and the child. Secondly, there is no evidence of how much the respondent had asked for. The respondent was obliged to prove her demanded for the payment for maintenance by evidence. She did not. Therefore, even though maintenance was mentioned in the complainant, it was not sought for in evidence and could not be awarded. Even the dowry that the respondent asked for, was not quantified, so that the appellant would respond to it. Therefore, in my view, even the claim for dowry would not succeed. It would not succeed for two reasons. Firstly, it was not pleaded. Secondly, it was it not proved. Since dowry is not a claim in general damages, it had to be pleaded and proved.

There is also another error in the award of maintenance for the respondent and the child. The maintenance instalments were ordered by the magistrate to begin from 23rd November 1993. From the evidence on record by the appellant, which was not controverted, the appellant and respondent stayed together as husband and wife from 23/11/1993 to May 1995. That evidence was not controverted. Therefore it was wrong for the learned magistrate to order maintenance for the period 23/11/1993 to May 1995. Maintenance, if at all, would only arise as from the date the appellant and respondent stopped staying together in May 1995 and not before then. However, even as from May 1995 maintenance could not be awarded, as the respondent asked is evidence for payment of dowry.

From the above reasons, I have no alternative but to allow the appeal. The appeal succeeds. I am not saying by any chance that the appellant might not be responsible for the maintenance of the child under the Children's Act 2001. That however, is a matter to be decided in the appropriate court under the appropriate law.

I allow the appeal and set aside the orders of the learned magistrate. However, if any amount have already been paid by the appellant on the basis of the learned magistrate's order, the same will not be repaid to him, as he prima facie has parental responsibility for the child. Each party will bear their own costs of appeal as well as the proceedings in the subordinate court, as this is a family matter.

Dated and delivered at Nairobi this 4th day of July 2006.

George Dulu

Ag. Judge