REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1372 OF 2001

CHRISTOPHER NDERI GATHAMBO……..……..……..PLAINTIFF

V E R S U S

SAMUEL MUTHUI MUNENE..…….DEFENDANT

JUDGEMENT

This is a sad case of burial involving a deceased female teacher, the Late Catherine Mwihaki Munuhe who died in her home at Umoja, Nairobi on 8.8.2001 but still lies in the mortuary here in Nairobi uninterred. This occasioned this case to be filed on 15.8.2001 by CHRISTOPHER NDERI GATHAMBO the alleged husband of the deceased who seeks to have the right to bury his wife in accordance with his wishes and in accordance with Kikuyu customary law. The Defendant Samuel Muthui Munuhe who is an elder brother to the deceased, opposed the Plaintiff on two grounds first that the deceased was not married to the Plaintiff and there was no marriage celebrated in accordance with the Kikuyu custom, secondly, that the deceased expressed her wish to her daughter and to her sister in law to be buried next to her mother's grave at Kiangoma Tumu Tumu in Nyeri.

The Defendant further counterclaims an amount they did not pray but wants the Court to order that the deceased's, body be given to the daughter of the deceased and the Defendant for burial.

The matter had taken two years when the witnesses evidence and submissions ended on 13.3.2003. The counsel who argued the case made extensive research and quoted 32 authorities between them and I am obliged to them for their industry. The issue central to this matter is marriage. The question to answer is whether there was a marriage between the deceased and the Plaintiff. If there was, should the husband then have the right to bury the deceased as his wife?Secondly was there a wish pronounced to the daughter by the deceased, and if so, should the wish be honoured irrespective of the existence of marriage? Lastly, if it was mere cohabitation, what are its effects.

I shall trace what witnesses said in support of their claims. PW1 Christopher Nderi Gathembo said that his "wife" died on 8.8.2001. He said before the deceased's death, they lived together as man and wife since 1984. The deceased introduced her to her Late Mother and that theirs was a childhood friendship starting in 1974 but matured when they became adults. Their relationship produced one issue, a daughter called Caroline Njeri born on 18.4.82. The witness said that the deceased introduced him to her eldest brother David Wachira and the Defendant with a view to seeking consent from them to marry her, but that the brothers were not happy with the proposal so in effect the couple never had consent. He said that the deceased's mother only gave to them her blessings. Between them the two also disagreed on the type of marriage. The deceased wanted a wedding, but the Plaintiff wanted a civil marriage. That they stayed at Umoja L156 but the house was in the name of the deceased, but that he helped to clear the loan.Deceased relatives would constantly visit and that around 1992 and after the deceased's mother stayed with them on and off for 2 years.That he contributed heavily to the education and upbringing of the daughter. During

his wife's sickness in hospital, he is the one who filled the forms for admission Exh.1 and on that form, the Defendant himself filled Plaintiff's name as the deceased's next of kin. He visited her twice a day for the one month the wife lay in the hospital and at death, he took the body to Chiromo Mortuary and both families started a joint funeral arrangement when the deceased's side disclaimed the marriage and stated that she was single, in the event two funeral arrangements appeared in the Nation Newspaper.

In cross examination, he admitted that there was no formal marriage between them either statutory or under the Kikuyu custom. He said that he based his claim to marriage on the basis of cohabitation and friendship, agreement and love. He said they never lived together at his house at home in Tumu Tumu but all the time lived together in Nairobi.There was no property of the several properties deceased owned that Plaintiff had a joint interest in. That although both were PCEA adherents, they never went to Church together as a family.

PW2 James Wangombe Hunja is the Chairman of Plaintiff's clan association called Karuoro and knew deceased as wife to the Plaintiff and as a member of his said clan association said how on 12.12.84 he with others including the Plaintiff, went to talk to deceased's uncle about marriage but the uncle declined to hold talks with them promising to do so at a later date, but in the event, he never did so. When Plaintiff's mother died, the deceased and her relatives attended and when deceased died they took action as a clan. Talking of dowry, he said a poor man can stay with a wife for a long time until he gets money and pays dowry because dowry is a continuous process. He said if a man and woman stay for a long time together they become man and wife even amongst the Kikuyu. He said PW1 and deceased married in 1984 that they were blessed with a child and they stayed together.

PW3, JEDIDA NYATHOGORA elder sister to Plaintiff confirmed that the deceased was wife to Plaintiff and that, they lived together and the whole family accepted them as such. In 1984, Plaintiff brought home the deceased to introduce her as wife to his mother.

PW4 JAMES KIBIRO WAGACHI a close friend to Plaintiff and the deceased confirmed that the two used to live as man and wife and carried themselves publicly as such for 18 years but the deceased's people were hostile to the union. He said Plaintiff nursed the deceased and paid a physiotherapist to attend her. He took active part in preparation of the funeral on the side of the Plaintiff until the issue of marriage came about and scuttled the preparations. He said when deceased was at the hospital, she could only murmur inaudibly and was not able to write. He also confirmed that there was no Church marriage or customary marriage.

PW5 JOHN CHUMARI NGARI confirmed that the deceased and Plaintiff stayed as man and wife in Umoja where they stayed together.

PW5 was a friend of the Plaintiff for 15 years and during all that time, he knew them as married.

In defence, DW1 Samuel Munuhe said he was elder brother to the deceased. He said all his 5 dead brothers were buried in the same place including two sisters who died at the age of 20 and Muthoni who died at 50 years un-married and it is at the same place they want to bury the deceased. Deceased's first daughter Njeri was also buried there.He also said that his sister was not married to Plaintiff but stayed with him together "as friends". Every time he visited his sister which was once a week he would invariably find Plaintiff there and that in 1992, deceased told him that the Plaintiff was Njeri's father. He denied that there was a visit to his uncle by Plaintiff's people. He also said that the system of 'come we stay' common in towns where a man stays in a woman's house raises eye-brows and parents of girls do not approve of it. He said the deceased nursed her sick mother 1984 – 1990 until she died living with her at Umoja. That deceased had several un-developed plots and some rental houses. He talked of the shared joint committee which was formed to arrange for the burial and of the differences that arose therefrom. Of the Church burial it is significant that the Women's Guild at PCEA Church, Jericho asked if the two were married meaning that they also believed that the two were married so when the Defendant said they were not they declined to burry her in the Church although they had prepared themselves to do so. He said during the time their mother was being nursed by the deceased, PW1 was never there.Again he said Plaintiff was staying there but left the day he filed this case in Court but he protested that the Kikuyu

custom do not recognize cohabitation called ‘come we stay’. He also narrated the Kikuyu marriage custom. He said that his sister told the daughter that she should be buried where her mother was buried and he wants to honour the wishes of her sister.

He says he was very close to his sister. He narrated how he came to know about Plaintiff’s being a friend to his deceased sister after her death. There was affidavit purported to have been sworn by the parties showing that they were married under the Kikuyu customary law, on 12.12.84 at Karatina. This affidavit was shown to them a day after the deceased’s death but the witness said the signature on it is not that of the deceased. He disclaimed monetary contributions by the Plaintiff for funeral. He claims an amount of Kshs.40,000/- being loss of family money on account of Plaintiff’s intervention.

DW2 Caroline Njeri Esther Wanja, the daughter of the deceased, said how her mother told her one day at the hospital where she was admitted and immediately before she lost her voice that she would like to be buried where her mother was buried. She also said that both her deceased mother and her father lived together at Umoja but the mother usually stayed alone. She said her father moved in, in 1992 after her grandmother’s death and that her mother told her of him being her father in 1992 but that he only visited her twice in school.

DW3 Gladys Wairimu Gathingira sister in law to deceased also said that the deceased told her that she was to be buried near her mother’s grave in Tumu Tumu. She now lives in the deceased’s home at Umoja.

DOCUMENTARY EVIDENCE

At the hearing, several documents were produced to confirm the intention or the life by both the deceased and the Plaintiff that they were man and wife: -

1. Certificate of Birth C No. 781727 showing that Caroline Njeri Wanja the single daughter of the union was born on 17.4.1982 Mother - Catherine Mwihaki Munuhe Father - Christopher Kester Nderi Gathambo

2. Leaving Certificate from Maryhill High School showing her School official name as Caroline Njeri Nderi, Nderi, being Plaintiff

3. Kenyatta National Hospital Admission to Private Wing on 2.5.2001 for Catherine Mwihaki Next of kin - Christopher Nderi

(The term ‘next of kin ’ described in Black Law Dictionary as meaning

(i) *Nearest in blood*

(ii) those entitled in law to take under statutory distribution of intestates estate, and term is not necessarily confirmed relatives by blood but may include a relationship existing by reason of marriage .”)

(4) Invoice No. A366271 of 22.8.01 from KNH in the names of Catherine Mwihaki Munuhe, she never changed her name but used her maiden name throughout.

(5) Application for legitimation of Caroline under Legitimay Act Cap 146 (6) Joint affidavit sworn on 18.4.2000 between Christopher Kester Nderi (Plaintiff) and Catherine Mwihaki (deceased) sworn on 18.4.20 each saying they married under Kikuyu customary law on 12.12.84.

(7) Birth Certificate of 26.4.82 for Caroline Njeri Wanja showing blank the column for ‘father’.

(8) Limited grant issued under HCP & A Cause No. 2080/2001 to Steven Davis Munuhe Mwema, Purity Karit Njau and Caroline Njeri Nderi.

The affidavits were presented and admitted in evidence, indeed they were evidence. DW1 said they were forgeries but there was evidence that they were sworn before a lawyer, Mr. Gatimu. It was not proved that they were forgeries.

There are two birth certificates, one with the father's name and the other without. The one with the father's name is consistent with the School Leaving Certificate which was issued earlier on 30.11.99 against the Birth Certificate of 11.5.2000. The first one was issued on 12.7.92 which shows that the two parents were not man and wife at birth of Caroline but became so later, hence school leaving certificate and later certificate of birth to reflect the new reality.

This confirms the evidence of Plaintiff that the child was born while they were still just friends, but later they became husband and wife and sought to legitimize the relationship.

FINDINGS

From this evidence, what are the findings of this Court? First it is admitted that there was no marriage between the parties, either customary or statutory or Church wedding and the Court finds so.

Secondly, there is evidence that deceased lived together with the Plaintiff in her own house at Umoja. The regularity and intensity of this cohabitation varies with almost every witness. According to PW1, it started in 1984 but then he was working in Arusha but when he came to Nairobi they would stay together. According to DW1 it never occurred as the Plaintiff merely used to drop in occasionally, yet all other friends of the Plaintiff; PW2, PW3, PW4 claim the two stayed together and were a married couple. DW2 the daughter says the father moved in with them in 1992 after her grandmother's death and moved out the day this suit was filed in 2001, but DW1 while denying that Plaintiff lived together with the deceased admitted that he in fact left the house after the death and after filing the case, moving with his belongings although DW2 says her father's belongings stayed behind. DW3 says she saw an old vehicle parked by and some clothes. Stuck up in a bag but she was not certain of the items in the bag.

I find that the Plaintiff lived with deceased as man and wife effectively from 1992 but before then stayed intermittently together due to various factors including work location for Plaintiff and the time mother of deceased was sick in the house. Thirdly, it is admitted that the girl Caroline Njeri is a biological product of this relationship having been born in 1982 while deceased and the Plaintiff were friends before they came to live together. Fourthly, I also find that deceased owned several rentable property and undeveloped plots. Fifthly Plaintiff never acknowledged this, sixth I find that to most people, who knew them, they appeared married to each other. PW4 would say whenever he went to see them that the Plaintiff would exclaim his presence by saying; "*Mama Njeri we have a visitor* ". They attended family gatherings together, she was a member of the Karuoro clan to which the Plaintiff belonged and whose chairman was James Wangombe Hunja, PW2. Seventh, I find that the deceased was a strong member of the PCEA Church at Jericho and was a member of Women's Guild there. Eighth, I find that the said women's Guild intended to arrange the deceased's burial as a member of PCEA and one of them but only declined having learnt later that deceased was not married. It is an indicator that even her church members originally believed they were married, which is further indication that deceased's marital status remained shrouded in mystery even to the Church where she was an active participant. They too believed she was married. Everyone has said deceased was religious and was an active member of PCEA Jericho. If she was not married, she would have told her Women Group. It is not conceivable. She should have lied to them.

On these facts, the Plaintiff argued strongly with considerable reliance on diverse authorities asking me to hold that there existed a marriage by presumption of law being based on their joint lifestyle and period taken. Secondly, although this was not distinctly set out that there existed a marriage because the parties themselves declared it in affidavit between them and also in the legitimation of their daughter and if marriage does not accrue from any one of those actions then they cumulatively prove that the parties intended to marry and held themselves as married, hence presumption.

The Defendants through reference supported argument of Dr. Khaminwa rejected the argument saying

there was no marriage actual or implied and, that there was no presumption of marriage in the Kikuyu custom, that there is no evidence to satisfy a presumption of marriage even under the common law.

The first question is to define what presumption of marriage is and whether a presumption of marriage arises from these facts. Bromley Family Law, 5th Edition 64 was relied on by both parties.It says: -

> "If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove that there was in fact no marriage, and not upon those who rely on it to prove that it was solemnized."

Bromley says that the two essentials of marriage are the ones really presumed that they went through a valid marriage and that they had capacity. Here, the Plaintiff says they cohabited for 17 years and there is a child born in the union so he urges a presumption. In the case of HORTENSIAH WANJIKU YAWE V PUBLIC TRUSTEES EACA C.A. NO. 13 OF 1976 (UR) Mustafa J.A. said: -

> "The position seems to me to be this. The appellant had testified that she was married to the deceased, and the deceased in an application in 1966 had stated that the appellant was his wife. By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for over 9 years before the deceased died.. and during that time the appellant bore him four children.. long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant only cogent evidence to the contrary can rebut such a presumption.. such a presumption carries considerable weight in the assessment of evidence. Once that factor is put into the balance into the appellant's favour the scale must tilt in the direction.. Even if the proper ceremonial rituals were not carried out that would not invalidate the marriage."

Dr. Khaminwa, argued persuasively that presumption of marriage is a common law concept with ecclesiastical background and cannot be imported into Kikuyu marriage custom, but this is merely a presumption and a presumption has been described by Phipson on Evidence as follows: -

PHIPSON ON EVIDENCE 5TH EDITION PP.44 -

> "Presumptions are either of law or fact. Presumption of law arbitrary consequences expressly annexed by law to particular facts and may be either conclusive or rebuttable.. presumption of fact are inferences which the mind naturally draws from given facts irrespective of their cause. They are always reputable."

HALSBURY'S LAWS OF ENGLAND 3RD EDITION VOL. 19 PAR 1323 says: -

"Presumption from Cohabitation

> Where a man and woman have cohabited for such a length of time and in such circumstances as to have acquired the reputation of being man and wife, a lawful marriage between them will generally be presumed, though there may be no positive evidence of any marriage having taken place and the presumption can only be rebutted only by strong and weighty evidence to the contrary".

In the case of GOODMAN V GOODMAN (1859) 28 LJ CH. 742. A Jewish man cohabited with a Christian woman for 28 years, there was general reputation that they were married and their children were baptized as Christians of both "husband", "wife" the husband's relatives declined to recognize the marriage the Court held that there was a presumption of marriage and the onus was on the person denying it.

The concept of marriage is almost universal.

> In the natural historical sense, marriage means -

"A more or less durable union between one or more husbands and one or more wives sanctioned by society and lasting until the birth and rearing of offspring"

In the legal sense -

Marriage is a contract between one or more males and one or more females for establishment of a family.

Encyclopedia Americana INTERNATIONAL VERSION VOL. 18 PP113.

Marriage as understood in Christiandom is the voluntary union for life of one man and one woman to the exclusion of all others.

It is also a civil contract entered into by consent of the parties with the form whether of a civil or religious nature prescribed by law."

BROOMS LEGAL MAXIMS 10TH ED. PP. 326. And in all communities, there is a ceremony which expresses the sanction of the society upon the union. Living together, rearing of children and others are symbols of marriage so if a man and a woman cohabit together, order their lives together, and appear as married to the public, the society conceives that situation as a married state. It is a presumption of fact.

One feature of marriage is its public nature even the common law recognizes only publicly contracted marriages – hence publication of banns, posting of notices at the DC's office for civil marriages in Kenya, witnesses and all that. Hence in research done among Kenyan ethnic tribes by Justice COTRAN and contained in his books RESTATEMENT OF AFRICAN LAW he says that it seems to conclude that African Customary marriages have sufficient in common with marriages in other parts of the world including European marriages apart from distinctions in polygamy and monogamy and brideprice but he says these should not be generalized. Writing of essentials of valid marriage under Kikuyu customary law, the same writer states that in those marriages there must be capacity, consent of the parties and their families, Ngurario , Rurario as ceremonial indicators then the start of cohabitation. Looking at all these, in YAHWE case Mustafa JA said: -

"I can find nothing in the restatement of law that Kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious are basically similar with the usual attributes and incidents attaching to them.

I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married under Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union and in my view it is applicable to all marriages howsoever celebrated.. In my view, once the appellant proved that she was living with the deceased as man and wife for over 9 years she was in law presumed to be married to the deceased. Unless the contrary be clearly proved. In other words, the burden is thrown on the Respondent to show that she was not so married."

The Court of Appeal held here that presumption of marriage is part of our law and is applicable in Kenya and is applicable to any marriage including Kikuyu customary marriage. In accordance with the principle of STARE DECISIS,

"This Court is bound by the decision of the Court of Appeal… on any proposition of law which the Court of Appeal applies in the decision of any case before it, whose facts would be similar to the facts of any case before this Court."

See HCCC NO. 3040 of 1994 AKINYI V MABECHE (unreported) the WANGILA's case.

On the facts of this case, the Defendants sought to have to dispel the presumption through evidence of

DW1, the brother of the deceased, SAMUEL MUTHUI. He said he never knew that Plaintiff stayed with the deceased until after the mother's death that he never knew Plaintiff as the father of Njeri until later years but in the same breath he admitted noting the frequency of the Plaintiff's visit. I must say DW1 was a descent honest witness, who tried against his nature and who was at great pains to hide his prejudice and dislike for the Plaintiff and in his evidence denied the knowledge he actually had of her sister's cohabitation with the Plaintiff.

DW3 GLADYS WAIRIMU GATHIGIRA was an outrightly prejudiced witness who was blatantly opposed to the union between the Plaintiff with her younger aunt (the baby sister of her husband). She now keeps her home. She said she did not know the father of Caroline Njeri, but surely with all the love she had for her baby aunt, she would not have omitted to trace from her and know the father of her illegitimate but only daughter whom she professed to love even had she not been married. She says the deceased did confide in her about the location of burial, whereas Caroline DW2 says her father's belongings are still in the house. DW3 who stays in the same home says she has never seen them. She says with an obvious condescending tone: -

> Q. Are Nderi's belongings there?
>
> A. I do not know. There are some goods in a sack. I have not looked in to see."

Dr. Khaminwa argued strongly that that presumption of marriage is a common law concept and is unknown to the Kikuyu custom citing opinions from various anthropologists. He quoted SLB Leakey's book. The Southern Kikuyu Before 1903 Vol 11 saying that: -

> "Among the Kikuyu there were many types of legal union between a man and woman, but by no means did all of them rank as marriage. There were eleven forms of legal marriages.."

The Defence witnesses tended to be biased and maintained hostile posture against the Plaintiff, however, this was not enough to displace the burden on them which they ought to discharge.

Of the daughter's position, I thought it was very telling from DW1's evidence when he said that a birthday party was held at City Cabanas to celebrate Caroline's 17th birthday when the Plaintiff failed to attend. He said;

> "The father did not attend the party and the young girl was very annoyed about it."

Here is a child who regarded her father with some affection and expected him to grace her birthday with his presence. The witness talked of 'come we stay'. This became a feature of this case. I can take Judicial Notice that it is a practice against which society raises eye brows and men and women who practice it shroud it under a cloud of mystery and in inexactitude and wish not to be identified as adherents and when it was suggested to DW1 if the relationship between Plaintiff and cleared was that known as 'come we stay' he answered saying "Kikuyu custom does not recognize 'come we stay' "before a woman leaves muhiriga he must undergo dowry payment"

Later, on suggestion that there was marriage by elopement, he said: -

> "I know late STANLEY KIAMA GATHIGIRA, he is my uncle.He wrote a book called "MIKARERE WA GIKUYU".. It was a true exposition of the Kikuyu tradition. In Chapter 6 page 17 of the book there is a heading UHIKA WA UKIRIMA it is a form. It means marriage by elopement. But the parents do not consider it as a marriage until they come home, but until parents are involved it is not a marriage."

This case has disclosed several types of unions. The Kikuyu customary marriage has been adequately described through the evidence of DW1, DW2 and from the writing, of S.B. Leakey (Southern Kikuyu), Jomo Kenyatta (facing Mount Kenya) and Eugine Cotran (Restatement of customary law) and decisions of the Courts.

There is statement by S.B. Leakey that there are eleven types of marriages under the custom and that there is one by elopement, and now there is the presumption of marriage, then there is the practice known as 'come we stay.' Which union was this between the deceased and the Plaintiff?

What is clear is that there was no Kikuyu, customary marriage, and no statutory marriage but again what is clear from the authorities cited that there were forms of marriages among the Kikuyu which were not necessarily the ones described by evidence in this Court by the witnesses. It is better to adopt elimination method and from what DW 1 says, it would not have been an elopement. The question of cohabitation has also featured as I have noted above. The issue is what is its effect on this case if it existed.

But first,

What is cohabitation?

COHABITATION

Prof. Bromley in his book BROMLEY'S FAMILY LAW 8TH EDITION says all about cohabitation in England, and I think this applies to what obtains here in Kenya as well under;

"Marriage and extra-marital cohabitation,

He says there are a number of couples living together outside marriage one in ten cohabiting couples who were not married.

And he says the reasons for this are that -

> "some cannot marry because one of them is in the process of obtaining a divorce (or is unable to do so). Some wish to avoid the financial responsibilities attached to marriage.Others wish to postpone the assumption of the legal incidents of marriage and regard cohabitation as a form of trial marriage or merely 'a pre-marital experience'. Some regard marriage as irrelevant and many cohabit because they reject 'the traditional marriage contract and the assumption of the roles which necessarily seem to go with it"

The practice is widespread and is evolving. Previously, extra marital cohabitation bestowed no rights on the cohabiters and the relationship as it involved extra marital sexual intercourse was regarded as immoral.It meant that any agreement made by such couples would not be honoured by Courts as being contrary to public policy.

The case of UPFILL V. WRIGHT (1911) IKB 506, the Plaintiff let a flat to a Defendant who was to his knowledge the mistress of a man who intended to visit her there. On a claim for rent, the Court held that the Landlord could not recover.

> Darling J., said: - "The flat was let to the Defendant for purpose of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the Defendant is a common prostitute or whether she is merely the mistress of one man.."

So, the same attitude was adopted by the Court in DIWELL V. FARNES (1959) 2 ALLER 379 where the Court refused to enforce a contract between cohabiters to buy a house where they lived jointly. The Court said it was founded on an immoral consideration.

The reasons that have conditioned the Courts attitude is the moral attitude based on the old Common Law position wherein extra marital cohabitation was considered wrong so no legal rights would accrue to them, secondly, is a reflection on the attitude of society generally that relationship that a couple enters into should be a stable relationship to support the up-bringing of children in all its aspects as only marriage relationship would provide. Thirdly, the Courts feel that if the law accords rights to un-married

state those rights that exist only in marriage then the institution of marriage would be weakened and the family would be weakened to the detriment of the society. However, now perhaps with the widespread nature of the practice the Courts in England are showing liberal latitude towards the practice as the Court of Appeal in HEGLIBISTON ESTABLISHMENT vs. HEYMAN (1977) 121 Sol.Jo. 853 (C.A.) shows. In that case the facts were that a lease provided among other terms that the premises should not be used for immoral purpose.The Plaintiff brought proceedings for possession alleging that the tenant was in breach of the covenant by permitting his son to live in the flat with a woman to whom he was not married.

It was held by Court of Appeal that this did not support forfeiture as what was meant was only to prevent the premises from being used as a brothel or for purposes of prostitution.

Should couples who merely cohabit have any rights it is considered that they should be given rights because many un-married couples are virtually indistinguishable from married ones, the parties (or the survivor) and their children may be as much in need of legal protection as spouses if the union breaks down as a result of the separation or is brought to an end by death. (See Bromley).

The present relaxation of judicial attitude in England can only be persuasive as most authoritative decisions that outlawed immorality are the old decisions that we apply by virtue of the law of reception, Like the case of PEARCE & ANOTHER V. BROOKS (1866) E EX. 213 but those decisions were based on public policy, but public policy is a variable concept, and must fluctuate with circumstances of the time and at the present times circumstances of the whole world are fairly similar .

In any case, the extension of rights and obligations to persons living together outside marriage raises the difficult question of defining the class to whom they should be extended. The obvious answer is to limit it to those living with each other as husband and wife.

These are the only two options left to Court to remedy claims in ‘come we stay’ situation.

Therefore, the question here is did these two just cohabit and decided not to marry and if so what is the Court to do about it in the light of what Bromley suggests? The Court heard in this case that there are increasing number of cases of cohabiting couples that do not marry. But apart from physical proximity and a sustaining sexual relationship, it is a union de void of any rights for either party in it unless they have written contractual arrangement. That also is rare since the law has not shown how to treat it as the law and the legislature in Kenya have not given a response to the practice, and even had there been a contractual arrangement here, the Courts would have still to investigate the bargaining positions of the parties to the agreement so that even had they been cohabiting merely the question would still be whether one has the right to bury the other. Since there are no cohabitation rights per se and no legislation dealing with cohabitation in Kenya and no clear policy of the law or legislation to guide the Court on the rights of cohabitants in this country, In my judgement, I would decide for giving rights to cohabitants.

Elizabeth Kingdom in her book ‘What is wrong with Rights ” says: -

> “most discussions of the legal implication of cohabitation draw attention to the confused ambivalent and occasionally contradictory state of the laws response. The comment is often linked, in the English context to two very different problems, the first is the difficulty of defining cohabitation and the second is the influence of Lord Denning…If cohabitation is a legal dimension, the situation is at least attributable to a number of Denning’s judgment.”

That is because Denning tried to develop the principle of constructive Trust in severe cases involving cohabiters.

Like in EVE V EVE (1975) 3 ALLER 697 Lord Denning thought that for an un-married woman to undertake extensive work in improving another cohabitor’s house was remarkable but if done by a married woman it would hence create a beneficial interest. But in many cases, Denning developed in property disputes the idea of constructive trust requiring no intention of the parties, hence it means that rights could be inferred by comparing it with married state and to assimilate cohabitants to the state of

marriage.

See COOK V HEAD (1972) 2 A LLER 38 That cohabitants rights of property should be settled as if married if they intend to. So the Courts do now use constructive Trust without necessity of establishing intention of the parties.

If the Court had to regard the phenomenon where a man and a woman have lived for 17 years spending the prime of their lives, bringing up a child to adulthood and appearing to the world as married and regard it as a mere open ended nothingness, it would be unjust.Kingdom in her above mentioned book discusses 3 ways of remedying these cohabitation rights problems, being through status, through contracts and through dependence. I favour the use of status approach that is relating it to marriage; the criteria the Court can use includes the cohabitants financial arrangements, the intimate commitment the outwardly observable features of the relationship, such as whether the cohabitants adopt the same second name, these are criteria in trying to define cohabitation, but they are not exclusive. Here there was notoriety and cohabitation, but one way I see Courts would use to solve these problems is in comparison with married state and to subject them to that status. Therefore, when there is no contract, the Courts can adopt that remedy. To shut it out perhaps as being immoral is no remedy at all. In my judgment, I would compare this with marriage state and hold that they were in effect like married persons, and a presumption should be declared. I am convinced that where a party has decided to join in cohabitation even without specifying their individual rights in that relationship the Court cannot just raise its hands up in impotent inability and ignore to exercise justice to the parties. I agree with Prof. Martin Rights in his Book "A System of Rights" pp 55 in saying that rights are essentially claims and;

> "hold irrespective of whether they have been acknowledged either in the society or more specifically by that person against whom the claim is made."

The Courts have shown the difference the English approach has taken in trying to cope with cohabitation phenomenon but I think the approach is applicable here as well.

I would hold that Court should subject cohabitation disputes to the married state. Using the principle of presumption of marriage which should in such a case be more easily presumed. Hence if in this case, the two only cohabited without intention to marry then depending on the period taken the notoriety of their lifestyle and commitment they should be regarded as married, hence presumption of marriage.

On these arguments, I feel I must hold that the two were man and wife and I so hold.

BURIAL

There is evidence that the deceased informed her daughter that she should be buried where her mother was buried. There is also evidence that the deceased informed her sister in law DW3 as much. I find this curious, why she should have chosen to tell her daughter, a mere child about such grave matters. There is some doubt as to why she decided not to inform her eldest brother DW1 who was with her during her terminal days, or both together with her husband to confirm compliance after her death. Why inform a child when execution of her wishes would be well carried out by the brother? This was an educated woman of proven ability as head of a school. If she felt adequately tailored to the wish to be buried where her mother was buried, she would have even written it down in a note. Why did she not? Then there is the evidence of PW3 which I consider to be biased and prejudiced and I find it difficult to believe her. In the event, therefore, I do not believe the claim that deceased directed her young daughter and sister in law where she should be buried. Had it been of priority concern to her, one would expect her to have written a will.

I, therefore, reject that claim.

As to where she should be buried, apart from the Defendants who have a particular burial place, PW1 did not say he had a burial place except that he said in his evidence during re-examination: -

"That there was land in my name near Keriko Primary School."

"…I gave Defendant Notice to bury my wife on my own land.."

Of the deceased's family cemetery at Tumu Tumu, PW1 said: -

"Not all members of the (deceased's) family are buried there…"

I am concerned that this being a burial case, the Plaintiff did not specify where he intended to bury his wife. The only near specific mention of location was when he said: -

"I intended to bury her at Keriko Primary School in Tumu Tumu."

The doubt really is whether he would actually bury her in a school? Was this their ground?

Why not at a plot in Keriko? And if he had it, why did he not mention it? Does Plaintiff have a place in Keriko belonging to him where he can bury his wife? It did not come out in his evidence. He merely said: -

"I have a small house at Keriko. We never lived there at all. We lived in Nairobi."

It appears to me that both parties lived in Nairobi all the while and not in the rural area at Tumu Tumu and I believe it would be in consistency with their neglected intentions to bury her in Nairobi.

I, therefore, direct -

1. That the body of Catherine Mwihaki Munuhe be delivered to her husband Christopher Nderi Gathambo to inter and bury in a permanent grave at a descent cemetery in Nairobi Lang'ata City Council Cemetery.

2. That the family of the deceased, the brother (the Defendant) and that of the Plaintiff, both acting under the Chairmanship of PW2 JAMES WANGOMBE HUNJA, Chairman of Karuoro Clan or anyone agreeable to them do organize the exercise and have this burial effected within 7 days of this judgement.

3. That there will be no order for costs in this case.

DATED this 4th day of July 2003.

A.I. HAYANGA

JUDGE

Read to -

Mr. Cerere for Plaintiff

Miss Oyanga holding brief Mr. Khaminwa

And Mr. Thiongo for Defendant

A.I. HAYANGA

JUDGE