



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

**CIVIL APPEAL NO 107 OF 1998**

**MWANZIA NZOKA.....APPELLANT**

**VERSUS**

**KITHEKA KITHUKA.....RESPONDENT**

*(Appeal from the Judgment of the District Magistrate's Court at Kitui, GM Nzilu Esq, dated 28th August, 1998 in Civil Suit No 15 of 1997)*

**JUDGMENT**

The respondent to this appeal, Kitheka Kithuka filed a claim in the lower court against Mwanzia Nzoka, the appellant seeking refund of the dowry for the defendant/appellant's sister he had married and later divorced to the tune of 2 cows and 68 goats and 784/=.

The defendant/appellant defended the suit averring that he denies the plaintiff's claim, that the mother of the plaintiff called Mwendu Kitheka is the one who used to pay dowry for her son Kitheka who was by then working at Nairobi and that was the year 1957, that on 9th July 1962 the defendant refunded the property or the dowry received by Mrs. Mwendu Kitheka the plaintiff's mother as the plaintiff was still in Nairobi, that the defendant has witnesses who were there during the time the defendant paid dowry to the plaintiff. That it is now over 30 years since the dowry was refunded and if he had any claim he could not have waited for 35 years to claim, the year which the dowry was paid is not indicated, the defendant therefore denied the plaintiff's claim.

The parties were heard in the lower court and the findings of the learned trial Magistrate are that in considering the case, the learned trial Magistrate found

“the plaintiff's evidence by far the most convincing than that of the defendant because under Kamba customary law dowry is not refunded to the female members of the bride-groom family. It is only refundable to the divorced husband if he is alive or to his brothers. The plaintiff was supported by his witnesses, that he was not paid back his dowry, the defendant wanted the court to believe that his mother paid the dowry back to the plaintiff's mother. His two witnesses and himself differed on the colour of the animals which were paid, a fact which shows that they did not sit down and concoct a good lie, that the upshot therefore is that the plaintiff has proved his case on a balance of probability”

and entered judgement for him as prayed.

The appellant was aggrieved by that finding and has appealed to this court citing 3 grounds of appeal namely that the learned trial Magistrate erred and misdirected himself by failing to find that the respondent failed to prove his case on a balance of probability, and he further erred and misdirected

himself by failing to find that the appellant proved on a balance of probability, that the dowry claimed by the respondent had been paid, erred and misdirected himself by holding that dowry is refundable to the male members of the family from his own knowledge of the customs when there is conflicting evidence as to what is the custom and he further erred, misdirected himself by making a finding of custom not supported by evidence, erred and misdirected himself by rejecting the evidence of the appellant and his witnesses as lies when there was no evidence to support it and he further erred and misdirected himself by disregarding the evidence of DW 1, Kiema and DW 2, Julius Mwanzia Kitusiyo who witnessed the dowry being refunded. The appellant therefore prayed for the appeal to be allowed and the decision of the learned trial magistrate to be reversed.

In his oral submissions in court counsel for the appellant reiterated the grounds of appeal and stressed the following points; that when the appellant admitted that the sister was married, divorced and dowry refunded, the burden of proof shifted to the appellant and the appellant discharged that burden by his testimony supported by trustworthy witnesses, that it is on record that appellant's sister Kavata was married by the respondent for two years and then they divorced, that by then the respondent was away in Nairobi while the appellant was in Mombasa and the mother of the defendant called two elders and refunded the dowry to the mother of the respondent, that nobody from the respondent's family claimed the dowry during the lifetime of the respondent's mother. The evidence of DW1 should have been believed as true as the one who was present when the two mothers refunded the dowry and received the same, the evidence of DW2, the man who had married Kavata after she divorced the respondent should also have been believed and he testified that he paid dowry for Kavata to the mother of appellant who in turn refunded the same to the mother of the respondent, that the brother of the respondent was present when the dowry was being assessed and he just denied that he was not present when it was refunded, that none of the respondent's witnesses mentioned the dowry which was refundable, that the learned trial Magistrate was required to assess the evidence and not custom, there was no proof that dowry could not be refunded to a female member, that according to *Restatement of Akamba Customary Law* page 8 paragraph 9 under customary law, dowry is refundable to the husband or his family and since the respondent was away in Nairobi, the mother received the dowry on behalf of the family, the learned trial Magistrate should not have held that there was no proof of refund because the appellant and his witness had differed on colours as the incident took place 38 years after ago and people are bound to differ on colours. There was no evidence to support the amount claimed, they have stated what the custom is that the dowry is refunded to the husband or his family and therefore the onus fell on the respondent to prove their assertions that the custom was that dowry could not be refunded on to a female member of the family. It is their stand that no reasons were given for rejecting the appellant's evidence which was well supported.

Acting, the respondent who was in person opposed the appeal because he filed the case in court and the court has allowed the same, that it is on record that he was away in Nairobi while the appellant was in Mombasa and the respondent had brothers at home and if any dowry was to be refunded, then the brothers could have known and could have been invited in the refund process, that according to custom, dowry is to be refunded to the husband and/or brothers and not to a woman as a woman cannot even decide where a house is to be constructed, if he fails here he will appeal to a higher court, he strongly objects to the allegation that the mother received dowry on his behalf, she could not have done so and then fail to show her children, that the man who married his former wife, told lies as he had to defend himself, to tell lies that he had refunded dowry and he in is the same group as the appellant to try and deny him his property; that the appellant's Advocate says that no decision was given then he is even prepared to take the *Githitu* oath, that this court should give its decision and if not favourable he will continue looking for his property. In reply counsel for the appellant stated that the respondent and his brothers are just denying receipt of the property when in fact they are aware that the same was refunded.

On the court's assessment of the facts herein it is clear that there is no dispute that the respondent married the sister of the appellant for a short time and then they divorced way back in 1959. It was not until 1997 when the respondent filed a case claiming refund of the dowry. In his evidence the plaintiff tended to suggest that he paid the dowry. But from his own evidence he does not say when he paid the said dowry, those who were present when he paid the dowry or how much it was. His witness, PW1 says that he came home in 1952 and then took a wife to the brother who was in Nairobi they lived together for a short while

and then they deserted each other and she went and married a man who comes from, Kitui central. He did not go to demand the refund of the dowry because the plaintiff was away in Nairobi. Kisengese Kitheka had not stated who paid the said dowry, when it was paid and those who were invited when the same was being paid. When cross examined the plaintiff said that he, the plaintiff was in Nairobi and the defendant was in Mombasa. That his brother and Kiema Kamba counted the bride price. His brother, P.W.1 stated that he could not go to the defendant for the assessment of the dowry because his brother the respondent was away in Nairobi.

The two, the plaintiff and his brother stated that after the plaintiff went to demand his dowry and the appellant told him to go where he wanted is when this case was filed. PW2 Nyamai Muthoka just stated that the meeting before the elder aborted and that is why the plaintiff came to court. PW3 another brother of the plaintiff stated that it is him who had to fetch and give out the dowry for his wife. Him too does not say how much it was, when it was paid and who received it and who was present when it was being paid.

When cross-examined, the witness said that he is aware that the defendant did not pay dowry back because it was not paid to him or to his brother Kisengese, he is aware that the defendant claimed that he paid the dowry to his PW3's, mother but under Kamba customary law the dowry is never refunded to a woman.

The defendant also gave evidence and called two witnesses. Their version is that the plaintiff married the sister in 1957 and they stayed together till 1959 when the plaintiff returned to her to her mother Kambua Nzoka. That it is the mother of the plaintiff who paid dowry for the sister and the dowry was refunded to her. That when payment was made the defendant was away in Mombasa and the plaintiff was in Nairobi. That during the lifetime of his mother nobody came to claim the dowry. When cross examined he stated that under Kamba customary law dowry is refundable to the payer, he denied that under Kamba customary law dowry is only refunded to men. He said they paid 2 cows, white and mixed colours and white bull. DW1 Kiema Kaunga stated that the disputants were not present when dowry was paid as the plaintiff was in Nairobi while the defendant was away in Mombasa. He says it is him and Kilove Mutava who heard the case. They were given two cows and one bull, one of the cows was red and another grey and the bull was brown. There was a balance of Kshs 6.00/= which was paid. When cross-examined DW1, stated that he paid the debt in full to Kilove and the plaintiff's mother and both of them are dead.

The second defence witness is DW2, Julius Kitusyo who said that he is married to the sister of the defendant whom he married in 1961. It is his evidence that when the mother of the plaintiff demanded her dowry back he proceeded to Mutomo with 2 cows and one bull, and on 9.7.62, he paid the dowry to Mwende Kithuka the mother of the plaintiff, one of the cows was red and the other one had mixed colours, white and black and that the bull had mixed colours black and white. That the plaintiff and his elder brothers were not there. That the defendant was not present as he was in Mombasa. The elder brother of the plaintiff was called but he refused to come. When cross-examined the witness stated that according to Kamba customary law the dowry is refunded to a person either the mother or the father, that Kiema Kamba was the elder for the defendant's mother while Kilove was the elder for the mother of the plaintiff.

The foregoing is the evidence which was before the learned trial magistrate. In his judgement he simply said that the plaintiff's evidence is convincing and rejected the defendant's evidence because the witnesses differed on the colour of the animals, they used to refund the dowry.

I have considered the evidence on the record in its entirety and I find that there were several issues raised from the pleadings and the evidence which the learned trial Magistrate did not consider and these are:

1. It was a fact that during the occurrence of the events complained of, the plaintiff was away in Nairobi while the defendant was away in Mombasa.
2. That the key players in this matter are mothers on both sides who have since died and they went with the best evidence available.
3. The plaintiff and his brothers do not say when they paid the bride price, how much was involved in terms of what was paid in order to lay foundation for what was claimed in the absence of such

evidence, the plaintiff has not shown the basis of what he has claimed in. More so when in his evidence he has not said that what was being claimed is what was paid. On their side the plaintiff and his brother have not stated who were involved in the payment of the dowry from both sides as none of the brothers say that they are the ones who paid the dowry. This paves the way for the defence contention that it is their mother who paid the dowry on behalf of the plaintiff and she is the one who received the refund. The defendant on the other hand claim that a refund was made. The defendant was away in Mombasa and so he cannot confirm or deny refund. But he brought two witnesses who claim to have witnessed the refund. The learned trial magistrate rejected their evidence because they differed over the colour of the animals used to refund the dowry. The appellant's counsel has urged this court to find that the discrepancy due to the long period of time passed and this explanation is reasonable as the plaintiff came to court 36 years after the events complained of took place. The parties were not contemplating a future case, and it is possible that colours would fade from their minds. This should not have been the only reason for rejecting their evidence. It is submitted by the appellant's counsel that other aspects of the evidence should have been considered well.

4. One crucial aspect of the evidence not considered by the learned trial Magistrate is the length of time the plaintiff took to come to court to seek redress 36 years had gone by. A marriage agreement is a contract and the cause of action remain alive for a period of 6 years. In the premises 36 years later the action was spend and the plaintiff's rights extinct. No explanation was given as to why the plaintiff or his brothers did not demand dowry immediately during the lifetime of the mother of the defendant or his own mother. He therefore sat on his rights and he is guilty of laches. The action is not maintainable.

As for the Kamba customary law of refund of dowry I have had occasion to look at *Restatement of African Law* by Eugene Cotran Volume I Chapter 3 page 32, Paragraph 4, it is stated that the husband is entitled to refund of the dowry plus their off-springs but he has to wait till the women remarries. T

he woman remarried in 1961 and that is when the plaintiff was entitled to claim back his dowry. There is no mention that such dowry cannot be refunded to his family or his mother for that matter more so when it is the mother who paid the dowry.

In view of what I have stated above the decision of the learned trial Magistrate cannot stand. It merits interference. The appeal is allowed, the lower court's decision is quashed and set aside.

2. The appellant will have costs of the appeal and the costs of the proceedings in the court below.

**Dated and delivered at Machakos this 6th day of of June , 2002**

**R.N NAMBUYE**

**JUDGE**