



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO 49 OF 1999

NGOKA.....APPELLANT

VERSUS

MADZOMBA.....RESPONDENT

JUDGMENT

This is an appeal against the judgment of Kwale DM 1 which was delivered on 17.5.99. The appellant here was the defendant in that court. I will refer to him as Ngoka. In a self drawn plaint filed on 27.12.1993, the respondent (Karisa) sought judgment for Sh 42,777/=. It was particularized as a refund of dowry but Karisa said it was a claim under Mijikenda customary law. He stated in the pleading:

“The defendant remarried my late son’s wife sometime in 1992. In spite of demand made to him the defendant has refused/neglected to refund the dowry, hence the action. The claim is under Mijikenda customary law.”

Ngoka filed his defence through Hare Mwarandu & Co Advocates denying that his name was Katana but Mbudzya Ngoka. He denied having remarried Karisa’s son’s wife as alleged or being liable for the amount claimed. He averred that Karisa had in fact sought the same dowry from another person before Kaloleni District Magistrate’s Court in 1987. He lost that case and should not therefore file a similar suit on the same issue.

Upon hearing the suit the learned DM 1 found for Karisa and ordered refund of the sum of money stated to be dowry if Ngoka wished to retain the wife or if not he pays the customary adultery compensation (*Malu*) to the extent of shs 2,000.

Ngoka was not satisfied with that judgment and filed this appeal. He challenges the decision on six grounds as follows:

- “1. THAT the learned trial magistrate erred in law and fact in awarding what was not sought by any party.
2. THAT the learned trial magistrate erred in law and fact in making a decision which was not specific and left to depend on speculative matters.
3. THAT the learned trial magistrate made a decision infringing the rights of parties not before him.
4. THAT the decision was based on purported customary laws and practice not proved by evidence.

5. THAT the judgment did not comply with statutory provisions.

6. THAT the decision was against the weight of evidence.”

Learned counsel Mr Magolo argued the appeal in omnibus fashion but he made the following points: That the claim as pleaded was in form of special damages and not a customary claim for dowry. Items of dowry were valued without any evidence on how the valuation was reached to amount to the claimed sum of Shs 42,777/=; That the judgment entered was in form of an alternative and therefore uncertain since Ngoka was told to pay the dowry or pay adultery compensation. No one raised the issue of adultery compensation and it was therefore an invalid finding and order; That the Mijikenda customary law was not proved that when a person dies leaving a widow and the widow is inherited, dowry should be refunded. It was the same dowry that was claimed from someone else. The appellant is supposed to have stepped into the shoes of that person. But that person successfully resisted the issue of refund of dowry and therefore it was wrong to admit the claim against the appellant. The case was *res judicata*. Finally he submitted that the appellant’s case was totally ignored and was not analyzed.

For his part learned counsel Mr Omwenga supported the findings and judgment of the lower court. It was found as a fact that the appellant inherited someone’s wife and had not paid dowry for her. It is the respondent who had paid the dowry and deserved a refund. It is Duruma customary law which was admitted by both parties and needed no proof. The case was not *res judicata*.

I have considered the appeal and the submissions of counsel.

The major attack on the proceedings is the lack of proof of the customary law applicable. As the law stands, customary law is a matter of fact which is subject to proof just as other facts which a court of law has to decide on. There was not expert called to establish the said custom and it was not correct to say, as the learned magistrate did, that the custom was admitted.

The learned magistrate may have been familiar with those customs but he was not a witness in the suit. That is why I think he took it upon himself to make an order relating to payment of customary adultery compensation (*Malu*) on which there was no evidence or pleading at all. The learned magistrate did not cite any known treatises or commentaries on Duruma customary law on “dowry” and “wife inheritance.” The two witnesses who were called by the respondent, PW 1, who was the father of the widow, and PW 2 the respondent’s son including the respondent himself did not profess to be experts and did not testify on Duruma customs on dowry payment and the conversion of animals or other kindred payments into modern currency. Nor did they testify on the place of widow inheritance in that community. It was a fatal flaw in the proceedings because customary law is not static but dynamic. The customary law existing in any particular era and area should be proved. The reason is provided in statute. The Constitution of Kenya recognizes customary laws and has established courts for its application. But the mode of application is clearly spelt out in the Judicature Act Cap 8 Laws of Kenya where in section 3(2) it states:

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it, or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

The court must therefore, from the evidence establishing any particular custom, be able to determine whether such custom meets the above criteria.

Take this case.

The widow in issue is a mother of three daughters two of whom were already married when the case was heard in 1997. Her husband was not the real son of the respondent but was already born when the respondent married his mother. After his marriage to the widow they had three children and they had established a homestead of their own away from the Respondent’s home. When the deceased died, a son

of the respondent attempted to inherit the widow citing custom but the widow refused and went to stay on her own. She later chose to have a relationship with the appellant who was related to her late husband.

In all this saga no thought is spared for the widow and whether she had a choice to make in the matter of her own life. Whether she should be inherited by other people without her consent in this day and age is clearly a human rights issue, and specifically a women's rights issue. It is also a health issue considering the worldwide scourge of the AIDS pandemic.

As so it is that courts must weigh the proved evidence and establish its concurrence with the Constitution and other widely recognized international norms. Women, in whatever community are no longer the commercial objects of yore and it is time customary law diehards woke up to that reality.

I applaud the widow in this case for refusing to be inherited. I find any custom that would force her to be inherited against her will would be repugnant to justice and a morality and in a breach of human rights. The only reason why the respondent went to court to claim refund of dowry is because of the widow's refusal to be inherited by his other sons. He felt miffed and slighted. He had tried to claim the dowry earlier when the husband was alive but he failed.

The court deciding that case said the husband had worked for the dowry when he was staying with the respondent in one homestead for many years. That he failed to recover from the deceased, he admits. If he could not establish the claim for dowry in that earlier case, why would he succeed in another court on the same facts against a person who stepped into the deceased's shoes?

All in all there was no cause of action against the appellant and the appeal is allowed. I set aside the lower court judgment. Costs of the appeal to the appellant.

Dated and delivered at Mombasa this 15th day of November , 2002 .

P.N WAKI

JUDGE