



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 526 OF 2000**

**MAINA MUIRURI WANGERU .....APPELLANT**

**VERSUS**

**BENINA WAITHIRA KAMAU**

**AND ANOTHER .....RESPONDENTS**

**J U D G M E N T**

In a suit filed at the District Magistrates Court at Kigumo on 30th May 2000,, the respondents sought from the appellant pregnancy compensation of 20 goats and six rams all estimated to value Kshs.80,000/= because the latter had had extra marital sex with the former and had made her pregnant.

The mother and daughter filed the suit which was heard by the 1st class magistrate (P. Mwangulu) on 19th July 2000, 4th August, 2000, 17th August 2000, 25th August 2000, and 1st September, 2000 when parties testified.

The second plaintiff – (2nd appellant) testified in the lower court and said that she had been a girl friend (lover) of the appellant since April 1999 and that on 10th June 1999 the two had extra-marital sex which ended in her conceiving.

That when she revealed this to her mother, the latter sent elders several times to inform the appellant who denied he was responsible for the pregnancy.

That even when the child was born on 8th February 1999 (I think she meant the year 2000) the appellant was informed about it but he continued to deny.However, the matter was reported to the chief and/or assistant chief who held a meeting or meetings in the presence of elders from the appellant and the respondent sides and it was decided that it was the appellant who made the 2nd appellant pregnant and that he should pay 20 goats and 6 rams to the 1st appellant, the mother of the 2nd appellant.

The appellant refused to pay and this is why he was sued in the lower court.

The first appellant echoed the evidence of the 1st appellant and testified that she was the one who sent elders to the appellant to ask him about this matter when she discovered her daughter was pregnant.

Mwangi Bague and Joseph Gichu Mwangi also testified as some of the elders sent by the 1st respondent to the appellant to discuss with him about the second respondent's pregnancy.

That they even attended the elders meeting over the dispute, where, though the appellant denied being responsible for the 2nd respondent's pregnancy, elders decided that he pays 20 goats and 6 rams according to Kikuyu Customary Law but that the appellant refused to pay and this is why he was sued in the case subject to this appeal.

The appellant's testimony was very brief. This is what he told the lower court.

***"I do not know Beth Wanjiku. This is a false allegation. I have never had sexual intercourse with her. That is all."***

The appellant called two (2) witnesses, namely Maina Ronald and Runge Njuguna who exonerated the appellant from blame as they counted the days the 2nd respondent said she had sexual intercourse with the appellant to the date she delivered the baby and found that the pregnancy could not have been that of the appellant.

The magistrate wrote and delivered his judgment on 15th September, 2000. He gave a brief background of the case and then concluded:-

***"In this case I find the plaintiff's truthful. Their evidence is unshaken and I accept it. I reject the defence denial. It is not really possible for a girl to allege pregnancy in respect of a man who she never went to bed with. On considering all the evidence, I am satisfied that the defendant had sexual intercourse with the plaintiff (2) and made her***

***pregnant. I adjudge the defendant to pay the pregnancy compensation as claimed with costs."***

This decision did not find favour with the appellant who lodged an appeal to this court on 11th October 2000 in a memorandum of appeal which had four (4) grounds of appeal. These were:-

- a) The learned trial magistrate erred in law and fact when he entered judgment for the respondent in accordance with Kikuyu Customary Law but failed to quote or give the source of the said law.
- b) The learned magistrate erred in law and fact when he believed the evidence of the 2nd plaintiff without collaboration (corroboration) when the same had been disputed by the defence.
- c) The learned trial magistrate erred in law and fact when he failed to appraise and/or analyze the evidence before him thus arriving at a wrong decision and
- (d) The learned trial magistrate erred in law and fact when he placed much weight on the evidence of the plaintiffs respondent based on belief and not tested facts, thus arriving at a wrong decision.

The appeal was heard by this court on 5th November 2002 when counsel for both parties submitted either for or against the same.

Mr. Magani for the appellant repeated that no specific law was quoted to justify the award of 20 goats and 6 rams as pregnancy compensation under Kikuyu Customary Law.

That since the evidence of the 2nd respondent as to her having sexual intercourse with the appellant was disputed, the learned magistrate was wrong in disbelieving it without scientific proof.

According to counsel the evidence placed before the court was not properly analyzed and that the evidence of the 1st respondent was mere hearsay. That the elder's evidence was inconsequential and that there was no evidence to backup the prices placed on the goats and rams.

Counsel prayed that the appellant be allowed with costs.

The 2nd respondent submitted that the magistrate delivered the correct judgment.

That this dispute had been deliberated upon by the sub-chief and the chief and a decision made in the respondent's favour. That when the dispute was before the chief, the appellant had requested that the parties go for medical tests and they were even given a letter by the chief's office to do so but that when

time came, the appellant failed to avail himself for the test.

That when, in court, the appellant denied knowing her or the kid, elders were selected to scrutinize the child and compare its appearance with that of the appellant and that they concluded that the two resembled one another. She asked the court to dismiss the appeal.

The 1st respondent also submitted and said the magistrate made no mistake because as per his judgment, this is how customary compensation is awarded and that to arrive at the value of the goats and rams, goats and rams, the market value of these animals was considered. She too prayed that the appeal be dismissed with costs.

These are the submissions which I have heard and recorded from counsel for the parties for consideration and decision.

On the first ground counsel for the applicant complains that learned magistrate based his decision on Kikuyu Customary Law whose source or authority he did not quote.

This is not so important. As far as I can find, what is important in a court decision is the principal behind such decision.

In this case, however, there is a persuasive text in Cotran's "Restatement of African Law Marriage and Divorce, Book 1, at page 18 paragraph 3 which states:-

***“causing pregnancy of an unmarried girl: Any person who makes an unmarried girl pregnant is liable to pay to the girl’s father a fixed amount by way of compensation under Kikuyu Law. The present compensation differs in the various Kikuyu Districts. ----- It was recommended that the amount of compensation should be uniform in all the***

***Kikuyu areas and that it should be twenty goats and six rams.”***

Apart from this customary offence under Kikuyu Law sexual intercourse with an unmarried girl is another offence according to paragraph 2 of the same text which is punishable by payment of three rams and one ewe as compensation. Counsel for the appellant must have perused this text and may be he only wanted to be reminded of it by counsel for the respondent, otherwise I am not satisfied this was a genuine complaint.

On the second complaint this was a customary claim and the learned magistrate who saw and heard the evidence from both parties was in a better position to assess their credibility from their evidence and demeanour.

He believed the evidence of the respondents as true and rejected that of the appellant as false; which he was entitled to do. The learned commented in his judgment that it was not really possible for a girl to allege pregnancy in respect of a man who she never went to bed with. And I dare add that she started blaming the appellant for this pregnancy from the time she missed her menstrual period.

The 1st appellant took lots of trouble to send various elders to see the appellant, reporting the matter to the assistant chief and the chief – all to show how the respondents were serious about the appellant’s involvement in this matter and that though he denied such involvement, his denial could not be believed.

On ground 3 again this was a customary claim and in such kind of claim, the courts interest in the main is to do substantial justice. There is evidence that during the hearing of the case a suggestion was made that some elders look at and compare the appearance of the appellant and that of the child and make their recommendations.

Much as this departure from the court process was unprocedural and of no evidential value, it had a lot of telling about how the parties and the court had concern over this dispute and were interested in

seeing that instant substantial justice was done to the parties.

This then supercedes the need for the detailed analysis of the evidence as is required under Order XX Rule 4 of the Civil Procedure Rules.

That the magistrate favoured the evidence of the respondents to that of the appellant does not necessarily mean he placed undue weight to the formers evidence over the later.

Given the evidence and the circumstances of the case the burden of proof required in such cases was discharged.

One more thing, though Cotran's Restatement of African Law, Marriage and Divorce at page 18 provides for compensation being paid to the father, I would wish to believe that either parent, be it a father or mother is entitled to such compensation.

As to the value of the 20 goats and 6 rams, the market value at the time of the case should provide their correct monetary value.

I dismiss this appeal with costs. Delivered this 12th November, 2002.

**D.K.S. AGANYANYA**

**JUDGE**